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No. 93-__

In the Supreme Court
OF THE
United States

July Term, 1993

SEA-LAND SERVICE, INC.,

Petitioners,

vs.

CLARENCE F. TINSLEY and MARION TINSLEY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit Court of Appeals has affirmed a judgment holding the shipowner liable when a chief mate was injured by a condition which remained a hazard solely because the chief mate neglected his duties over a period of years. The Ninth Circuit also affirmed an order awarding postjudgment interest before the shipowner had been judged liable for the hazardous condition. Sea-Land's Petition for Writ of Certiorari presents the following questions for review:

1. Should a chief mate be held to a higher standard of care than ordinary seamen in determining the extent to which the shipowner should be held responsible for injuries which the chief mate suffered because of conditions for which he was responsible.

2. Can post-judgment interest accrue under 28 U.S.C. §1961 before the trial court has apportioned liability.

LIST OF PARTIES

The petitioner in this Court is Sea-Land Service, Inc. The action was originally brought against Sea-Land Corporation, of which Sea-Land Service, Inc., was a wholly-owned subsidiary. Sea-Land Corporation was subsequently merged into Sea-Land Services, Inc. Respondents in this Court are Clarence F. Tinsley and Marion Tinsley, husband and wife. There were no other parties in the lower court proceedings.

RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Petitioner is a wholly-owned subsidiary of CSX Corporation. CSX Corporation has many other subsidiaries, all of which are wholly-owned. Sea-Land Service, Inc., also has numerous subsidiaries, all of which are wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court

of Appeals for the Ninth Circuit entered in these proceedings on February 16, 1993.

JURISDICTION IN THE COURTS BELOW

Respondents brought this action under the Jones Act, 46 U.S.C. § 688, and general maritime law, to recover for damages allegedly suffered by Clarence Tinsley ("Tinsley") while employed as a chief mate on the vessel GALVESTON, operated by petitioner. The District Court exercised jurisdiction under 28 U.S.C. § 1333(1). The District Court entered its final judgment in favor of respondents on May 30, 1991. The Court of Appeals exercised jurisdiction over petitioner's appeal pursuant to 28 U.S.C. § 1291.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The action was first tried to the District Court on March 20, 1989. The District Court found that the vessel was unseaworthy and Tinsley was free from contributory negligence. Judgment was entered in favor of respondents on March 24, 1989, for $721,673.00.

Sea-Land appealed on April 13, 1989. The Ninth Circuit filed a Memorandum Decision on October 29, 1990, which reversed the district court's finding that Tinsley was free from contributory negligence and remanded with instructions to determine the extent to which Sea-Land's liability should be reduced on account of Tinsley's fault.

On May 29, 1991, the District Court filed supplemental findings of fact and conclusions of law which assessed Tinsley's fault at 10% and reduced the damage award to $649,505.70.[1] The District Court awarded post-judgment interest at 9.43% from its original judgment of March 24, 1989. The judgment on remand was entered on May 30, 1991. On July 12 the District Court entered Supplemental Findings of Fact and Conclusions of Law which adopted proposed findings submitted by the plaintiffs' counsel. The District Court vacated the Supplemental

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[1]Due to a computational error, the amount of Sea-Land's Liability was stated to be $654,986.70. However, the parties have agreed that the correct amount is $649,505.70, and the judgment has been satisfied in that amount.

Findings of Fact and Conclusions of law three days later without entering any new findings or conclusions.

On June 4, 1991, Sea-Land appealed from the District Court's Judgment on Remand. Sea-Land contended that the District Court's apportionment of liability was erroneous as a matter of fact and law, and the award of post-judgment interest from the date of the District Court's original judgment was erroneous as a matter of law. On November 20, 1992, the Ninth Circuit issued two decisions affirming the judgment on remand. One decision was a memorandum decision, not for publication, which affirmed the apportionment of responsibility for Tinsley's injuries. The second decision, published at 979 F.2d 1382 (9th Cir.1992), affirmed the award of post-judgment interest. Sea-Land filed a petition for rehearing on December 3, 1992, which was denied by the Ninth Circuit on February 16, 1993.

The following opinions are reprinted in the Appendix: the findings of fact and conclusions of law filed by the

district court on March 27, 1989 (A-1); the memorandum decision filed by the Ninth Circuit on October 29, 1990 (A-13); the district court's supplemental findings of fact and conclusions of law filed on May 29, 1991, the judgment on remand entered May 30, 1991 (A-34); the findings of fact and conclusions of law filed on July 12, 1991 (A-40), and the order vacating the supplemental findings (A-45); the memorandum decision filed by the Ninth Circuit on November 20, 1992, affirming the district court's apportionment of fault (A-47); the decision filed by the Ninth Circuit on November 20, 1992, affirming the district court's award of post-judgment interest (A-61); and the Ninth Circuit's order of February 16, 1993, denying respondent's petition for rehearing (A-71).

JURISDICTION OF THE SUPREME COURT

This Petition for Writ of Certiorari seeks review of the two decisions filed by the Ninth Circuit Court of Appeals on November 20, 1992, under the caption Clarence F.

Tinsley and Marion Tinsley v. Sea-Land Corporation, No. 91-35762. Sea-Lands' petition for rehearing from those decisions was denied on February 16, 1992. Sea-Land's Petition for Writ of Certiorari invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY INVOLVED

Although this action was originally brought under the Jones Act as well as general maritime law, the district court did not find that Sea-Land was negligent. The sole basis for liability is unseaworthiness under general maritime law. Consequently, the Jones Act is not involved in this petition. The only statutory authority involved is 28 U.S.C. §1961(a), captioned "Interest", which provides as follows:

> (a) **Interest shall be allowed on any money judgment in a civil case recovered in a district court.** Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. **Such interest shall be calculated from the date of the entry of the judgment,** at a rate equal to

> the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average weekly accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges. (emphasis added)

STATEMENT OF THE CASE

I.

INTRODUCTION

Tinsley's injury occurred while the vessel GALVESTON was transporting refrigerated containers on deck from Kodiak, Alaska, to Tacoma, Washington. The containers were stowed three tiers high at Hatch No.4. Tinsley fell while attempting to read the temperature gauge on a third-tier container. Respondents alleged that the GALVESTON was unseaworthy, and Sea-Land was negligent, in that there was no catwalk affixed to the stacking frame supporting the third-tier containers at Hatch

No.4. Sea-Land contended that Tinsley's injuries were caused solely by his long-standing neglect of his duties as chief mate.

II.

FACTUAL BACKGROUND

A. Tinsley's background and experience. - Tinsley was a seaman with approximately 40 years' experience. He was the chief mate on the GALVESTON at the time of his injury, and had occupied that position for several years.

B. The stowage of containers on the GALVESTON. - The GALVESTON was employed year-around in the transportation of refrigerated containers between Tacoma and Kodiak. The containers were stowed on deck in tiers. The first tier was loaded directly onto the hatch covers. Portable stacking frames were placed across the top of the first tier, with separate stacking frames for each hatch. The second tier of containers was loaded into the stacking frames. Containers were not usually stowed at

the third tier of Hatch No. 4. However, there were a few voyages every summer when containers would be stowed at that location. At such times the third-tier containers were loaded onto portable stacking frames in the same manner as the second tier containers. Catwalks were welded onto the stacking frames used for the second tier containers, but not the stacking frame used for third-tier containers at Hatch No.4. This was the basis for the trial court's finding of unseaworthiness.

C. Tinsley's ability to anticipate the unseaworthy condition. - Tinsley testified that he had climbed the third-tier containers at Hatch No. 4 "hundreds of times" before his injury, and knew before the start of each year that there would be a few voyages every summer when the vessel would carry third-tier containers at Hatch No. 4.

D. Tinsley's responsibility for safety. - As chief mate, Tinsley was the officer who was assigned responsibility for the safety of working conditions on deck and in

connection with the ship's cargo. He was the officer upon whom Sea Land relied to correct dangerous conditions aboard ship or report them so that they could be corrected by shore-side personnel.

E. The circumstances of Tinsley's injury. - Tinsley's purpose in climbing to the third-tier containers was to read the temperature gauges at the end of each container. Ladders were built onto the ends of each container. Tinsley's method was to climb the second-tier container ladder, reach around the stacking frame, and climb onto the third-tier container ladder. He slipped and fell while reaching around the stacking frame to the third-tier container ladder at Hatch No. 4.

F. Tinsley's ability to have avoided the unseaworthy condition. - It was not necessary for Tinsley to read the temperatures of the third-tier containers. While containers on the first and second tiers were frequently stuffed with chilled rather than hard-frozen cargoes, which

had to be monitored closely and maintained near the 32-degree mark, the third-tier containers were stuffed with hard-frozen cargoes. Those cargoes remained hard-frozen without being monitored on the three-day voyage from Kodiak to Tacoma. Sea-Land deliberately stowed the third-tier locations with hard-frozen containers for the specific reason that they did not have to be monitored. Tinsley knew of that practice because it was customary, and because he was given a stowage plan at the beginning of each voyage which showed the location and temperature requirements of every container on the vessel.

Moreover, Sea-Land had distributed a safety directive to all of its crewmen which stated that "Whenever circumstances (i.e., heavy weather) prohibit the normal reading of operating reefers an entry is to be made in the remarks section of the deck log indicating the time and 'Reading-Recording Reefer Temperatures not possible due to _____.'" There was conflicting testimony as to whether

the directive was triggered by the stowage of containers at third-tier locations away from catwalks. However, it is undisputed that Tinsley ignored the directive on the occasion of his injury and had never attempted to inquire as to its meaning. It is also undisputed that Tinsley had invoked the directive on prior occasions when the containers were "stowed third tier - no catwalk attached impossible to read when vessel rolling."

G. The means available to read the container temperatures safely. - Inasmuch as Tinsley chose to read the third-tier containers, there were portable ladders and temporary catwalks which he could have used to reach them. Although there was conflicting testimony as to whether such methods were practical, it was undisputed that they are customarily used throughout the American merchant marine to access higher level containers. At the time of trial Sea-Land was the only American carrier to provide catwalks on its vessels.

H. Tinsley's failure to report the dangerous condition. - If Tinsley felt that it was necessary to read the third-tier containers, and that portable ladders and stagings were inadequate, he had the duty as chief safety officer to report that fact to Sea-Land. Sea-Land required monthly safety meetings to be held on all of its vessels for the specific purpose of enabling the seamen to report conditions on the vessels which they considered dangerous. Tinsley was the officer responsible for conducting the safety meetings on the GALVESTON, keeping records of all matters reported at those meetings, and sending copies of the records to Sea-Land's shoreside managers so that they could monitor compliance with safety requirements. Yet neither Tinsley nor anyone else, on the GALVESTON or any comparable Sea-Land vessel, ever reported that the lack of third-tier catwalks at Hatch No. 4 created a dangerous condition.

I. Sea-Land's reliance on Tinsley to report the unseaworthy condition. - Tinsley admitted that if catwalks

were to be welded onto a stacking frame for use at Hatch No. 4, the welding would have had to be done by shoreside personnel. However, the danger created by the absence of a third-tier catwalk could not have been appreciated by Sea-Land's shoreside managers in the absence of a report from Tinsley. The Ninth Circuit found in its Memorandum Decision of 1990, which was decided by a different panel than the decision under review, that "Sea-Land's management undoubtedly knew catwalks were not installed at each level of all reefer stacks, but that fact alone tells us little. The crucial question is whether the absence of a catwalk at Hatch #4 should have been perceived by Tinsley's superiors as an obvious danger...The danger here was obvious only to those initiated in the rites of reefer climbing." Memorandum Decision of October 29, 1990, p.12 (emphasis in the original). It was undisputed that Sea-Land's managers had no independent basis for appreciating the dangerous condition created by the lack of third-tier

catwalks. It had never been reported to them as the cause of an injury or a dangerous condition. Thus, Sea-Land was necessarily dependant upon Tinsley to request the welding of catwalks or other measures if Tinsley believed that the condition was dangerous.

J. Sea-Land's ability to correct the unseaworthy condition. -The Ninth Circuit also found in its 1990 decision that "the defect in the ship was rectifiable; plaintiff was not confronted with a general seafaring risk of the kind courts have excused seamen from reporting - such as having to go on deck during a violent sea." Memorandum Decision of October 29, 1990, p.11. Tinsley himself testified that if the dangerous condition had been reported, catwalks could have been used at the third tier of Hatch No. 4 as easily as at other locations on the vessel. It would also have been feasible for Sea-Land to instruct Tinsley not to monitor the third-tier temperature gauges, since the third-tier containers

were hard-frozen. Either of those measures would have prevented Tinsley's injury.

REASONS FOR GRANTING THE WRIT.

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE SUPREME COURT'S POLICY OF PROTECTING SEAMEN FROM UNSAFE WORKING CONDITIONS ABOARD SHIP.

A. Standard of Review. - There is no dispute as to the nature of Tinsley's duties as chief mate, the manner in which his injury occurred, or the fact that Tinsley made no attempt to avoid the allegedly dangerous condition or complained that it was dangerous until he filed suit. Sea-Land contends that the District Court and the Court of Appeals applied an incorrect legal standard to those undisputed facts. This is an issue of law, subject to de novo review. United States v. Singer Manufacturing Co., 374 U.S. 174 (1974); United States v. Parke, Davis and Co., 362 U.S. 29, 44-45 (1960), later app. 365 U.S. 125 (1961).

B. The law of unseaworthiness must account for the means which the shipowner has to make the vessel seaworthy. - In a series of cases beginning with Mahnich v. Southern S. S. Company, 321 U.S. 96 (1944), and culminating in Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), the Supreme Court created a no-fault cause of action for seamen injured by conditions on the vessel which are unseaworthy in that they are not reasonably safe for their intended use. However, the duty to provide a seaworthy vessel cannot be considered in a vacuum. In order for that duty to achieve its social purpose, it is necessary to enforce the duty in a manner which helps to prevent the seamen from being injured in the first place. It is therefore necessary to recognize the responsibility that the ship's officers have for exercising the shipowner's duty on the vessel, and to adopt rules which prevent them from profiting from their neglect of their duties. In the present case it was purely fortuitous that the unseaworthy condition injured Tinsley and

not an ordinary seaman under his authority. If the Ninth Circuit's decision is allowed to stand, ordinary seamen will be put at increased risk of injury from the negligence of their officers.

C. As between Sea-Land and Tinsley, Tinsley was solely responsible for his injuries. - Shipowners like Sea-Land are complex organizations which necessarily contain divisions between persons who work on the ship and others with managerial authority who work ashore. The ship's officers are the persons through whom the shipowner's authority and responsibilities are exercised on the vessel. At the same time, they are the means by which information about conditions on the vessel can be passed back to the shore-side decision-makers. This function of ship's officers was placed before the courts below by the testimony of Captain Prindiville, who was fleet manager for Sea-Land's West Coast operations. Captain Prindiville gave undisputed testimony that he relied on Tinsley because:

> Chief mate primarily is the man in charge of the cargo operation. I expect him to be my arms and legs on the scene talking to the marine manager. I don't want to have to carry that cargo on the ship. That's not the reason I have a desk and office in Tacoma. The reason the chief mate is on the ship is to take care of that scene.

Tinsley's neglect of his duties would have made Sea-Land liable if another crewman had been injured by the condition which Tinsley neglected. However, as between Sea-Land and Tinsley, Tinsley was solely responsible for his injuries. Tinsley's neglect of his duties is what permitted Sea-Land to believe that the absence of third-tier catwalks was not a dangerous condition. Inasmuch as other American carriers customarily use portable ladders, stagings and harnesses to reach upper-tier containers, Sea-Land's shoreside managers could have thought that such methods were satisfactory for the crew members on the GALVESTON. They could also have thought that the built-in container ladders were safe to climb, or, in view of the safety directive and the fact that the third-tier containers

were hard-frozen, that crewmembers would have refrained from reading the third-tier container temperatures if it was unsafe to do so. Since no one in Sea-Land's employ had ever been injured by the absence of third-tier catwalks, or had ever complained that it created a dangerous condition, the shoreside managers would have had no reason to think otherwise in the absence of a report from Tinsley.

D. The legal standard applied by the Ninth Circuit was inappropriate to Tinsley's position as the officer responsible for the condition which caused his injury. - The record contains specific evidence as to certain steps which Sea-Land could have taken to avoid or correct the unseaworthy condition if Tinsley had reported it, such as installing a catwalk or instructing Tinsley not to read the third-tier container gauges. For example, Tinsley himself testified that a catwalk could have been installed at the third-tier of Hatch No. 4 as easily as at other locations on the vessel. Other witnesses testified that Sea-Land was

constantly rewelding and replacing catwalks at other locations on the vessel, and could have done the same at Hatch No.4. There was also specific testimony from Captain Prindiville, Sea-Land's manager of fleet operations, that safety was a paramount concern on Sea-Land vessels and that Tinsley was not required to read the third-tier container temperatures if he felt that it was dangerous to do so. Captain Prindiville testified further that Sea-Land followed a deliberate policy of placing the hard-frozen containers in third-tier locations for the specific purpose of relieving the seamen of the need to climb to those locations. There were also extensive safety meeting reports which showed that Sea-Land was very active in responding to safety concerns. Although some of the conditions reflected in those reports were relatively trivial, others them involved structural changes of a magnitude comparable to the welding of a catwalk onto a stacking frame. There was no evidence that

Sea-Land had ever knowingly required seamen to work under conditions known to be unseaworthy.

Nevertheless, the Ninth Circuit affirmed the district court's decision simply because the record contained some speculative testimony that Sea-Land might not have installed a catwalk or abandoned container readings if the unseaworthy condition had been reported to them. The Ninth Circuit stated that "because Sea-Land bore the burden of proof and there was no direct evidence that Sea-Land would have installed third-tier catwalks or abandoned temperature reading of third-tier reefers, the district court's finding that plaintiff's failure to report the dangerous condition was no more than ten percent of the cause of his injuries was not clearly erroneous." Memorandum decision of November 20, 1992, p.7.

Sea-Land will not ask this court to reweigh the evidence considered by the trial court, except to the extent of recognizing that the Ninth Circuit held Sea-Land to a

standard that was impossible under the circumstances and legally inappropriate for a ship's officer like Tinsley. The liability of Sea-Land should not turn on speculative testimony about what would have been done in a situation which never arose, particularly when it was the inaction of the plaintiff himself which prevented the situation from arising. It was Tinsley's own failure to report the unseaworthy condition that caused the lack of "direct evidence" cited by the Ninth Circuit. Sea-Land contends that since it produced undisputed evidence of measures which could have been taken to avoid Tinsley's injury, and Tinsley produced no "direct evidence" that Sea-Land would have refused to correct the condition if it had been reported to them, the Ninth Circuit erred as a matter of law in affirming the district court's judgment. While the standard applied by the Ninth Circuit would have been appropriate for suits by ordinary seaman, who depend upon the ship's officers for their safety, it is not appropriate when applied to the officer

who was responsible for the condition of which he complains.

In addressing Sea-Land's argument that Tinsley's position should subject his claim to a higher standard of scrutiny, the Ninth Circuit distinguished Skandalis v. M/V Galini, 1974 AMC 1671 (E.D.Va.1974), in which a second mate was barred from recovery because he failed to order other seamen to assist him in a shipboard task which caused his injury. The Ninth Circuit stated that "Plaintiff's authority is relevant only to the extent it might have been employed to avert the danger." Mem. Decision of November 20, 1992, p. 8. The Ninth Circuit failed to recognize that Sea-Land's shoreside managers were not in a position to recognize the hazard created by the lack of third-tier catwalks, and placed officers like Tinsley on the vessel for the specific purpose of informing them. Because of Tinsley's experience, expertise, and duties on the vessel, Sea-Land's shoreside managers relied upon his judgment as to which conditions were safe.

Thus, Tinsley's authority was relevant not only to avert danger during shipboard operations as in Skandalis v. Galini, but also to set in motion the process of correcting unseaworthy conditions which Sea-Land's managers could not identify from their shoreside offices. Because the Ninth Circuit's decision failed to recognize the significance of Tinsley's position on the vessel, and applied a standard of review that is inappropriate to officers such as Tinsley, the decision must be reversed.

E. This Court has recognized on other occasions that the ship's officers are subject to a higher standard of conduct than ordinary seamen. - The paternalistic attitude which the courts have adopted toward ordinary seamen depends considerably upon the extent to which they are subject to the authority of the ship's officers. In Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932), this Court held that ordinary seamen are subject to different limitations on recovery than land-based workers because:

> The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. . . The master's authority is quite despotic, and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. (Citations omitted). 287 U.S. at 377.

The nature of shipboard authority was also a basis for the holding in Socony-Vacuum Oil Co., Inc. v. Smith, 305 U.S. 424 (1939), that the assumption of risk defense which had been recognized in civil law was not applicable to actions by ordinary seamen under the Jones Act. The Court stated that ordinary seamen are subject to different policies than land-based workers because:

> The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. 305 U.S. at 430 (emphasis added)

In the present case, Tinsley was the superior officer. His authority on the vessel differentiates him from ordinary seamen and subjects him to a higher standard of conduct.

For example, it is stated in 1 Norris, The Law Of Seamen (4th ed. 1985), pp. 612-613, that:

> While an isolated incident of disobedience not of an aggravated character in a crewman may receive indulgence in the sense that a discharge would not be permitted, ships' officers are treated differently. Their higher position, greater compensation and the power and authority given to them to command others require a correspondingly higher degree of responsibility.(emphasis added)

By the same token, Tinsley's long acquiescence in the condition which he now complains of should not be indulged in the same manner that it would be indulged on the part of an ordinary seaman. The Supreme Court stated in Cortes that:

> Out of this relation of dependence and submission there emergences for the stronger party a corresponding standard or obligation of fostering protection. 287 U.S. at 377 (emphasis added).

This "obligation of fostering protection" is the obligation which Tinsley breached.

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER COURTS WHICH HAVE HELD THAT A SHIP'S OFFICER CANNOT RECOVER FOR INJURIES CAUSED BY HIS NEGLECT OF THE DUTIES OF HIS OFFICE.

In Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974), a chief engineer slipped on an oily engine rail. Like Tinsley, the chief engineer was responsible for safety in the area of the ship where he was working. The district court instructed the jury that the chief engineer could not recover if the injury was caused by his failure to exercise that responsibility. The court of appeals held that the jury instruction was proper and affirmed a judgment in favor of the shipowner. Comparing the case before it with Caddy v. Texaco, 292 N.E. 2d 348 (Mass. 1973), in which the seaman was allowed to recover, the Court of Appeals stated that:

> [In Caddy], a seaman was instructed to clean up oil and do some other work...here plaintiff was the one to tell himself... there must be a point where one in charge cannot give himself the wrong instruction and recover from the ship. 507 F.2d at 1323, n.2 (emphasis added).

Like Peymann, Tinsley "was the one to tell himself." If an officer is injured while attempting to repair or alleviate an unsafe condition within the scope of his duties, the officer's recovery can be reduced for contributory negligence. However, the officer's recovery should be barred altogether if he ignores a condition which could have been corrected or avoided. That is exactly what Tinsley did.

The distinction between attempting to correct a condition and ignoring it is illustrated by pairs of cases in the Second and Ninth Circuits. The Second Circuit cases are Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2d Cir. 1952), and Dixon v. United States, 219 F.2d 10 (2d Cir. 1955). Walker involved a steel filing cabinet on which the drawer catches were in disrepair. The master ignored the condition, like Tinsley, and was injured when the cabinet opened suddenly as the ship rolled. The district court sent the case to the jury on the ground that the master's negligence should reduce his recovery according to the rule of comparative

fault. The court of appeals reversed and remanded for a new trial on the ground that the jury had been instructed improperly as to the master's duties. 193 F.2d at 774. The court of appeals held that:

> In the case at bar, since the plaintiff was master of the ship, he fell within this [primary duty] doctrine. . . Thus, if the plaintiff failed to repair the catches, although he was able to do so, his failure was not only 'contributory negligence' in the first sense, but also a breach of his duty to the defendant which barred his recovery absolutely.

193 F.2d at 774.

Dixon involved a ship's ladder on which the bottom rungs were damaged. The chief mate discovered the damage and reported it, unlike Tinsley. Repairs were undertaken the following day. The master subsequently directed the chief mate to verify that the ladder had been repaired. Instead of inspecting the ladder from the bottom, and checking each rung before he used it, the chief mate inspected the ladder from the top down and was injured when some rungs gave way. The court of appeals ruled that

since the chief mate had fulfilled his duty to discover the *defective condition and initiate repairs, his carelessness for* his own safety would not bar his recovery. 219 F.2d at 17. The court stated that:

> Cases such as Walker v. Lykes Bros. S.S. Co., . . . are in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before us. Those cases are only instances of the firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship . . . . Such cases are quite inapposite here. [The chief mate] was not guilty of any breach of duty to his employer. 219 F.2d at 16-17.

The relationship between Walker and Dixon finds an exact parallel in the Ninth Circuit cases of Reinhart v. United States, 457 F.2d 151 (9th Cir. 1972), and Stanworth v. American Steam Trawlers, Inc., 523 F.2d 46 (9th Cir. 1975). Reinhart involved a chief mate like Tinsley, whose responsibilities included the safety of the working conditions on the vessel. Longshoremen had installed wooden

sheathing in the hold to protect the vessel's hull from being damaged by the cargo. Portions of the sheathing were broken when a particular cargo was discharged. As in the present case, the broken sheathing had to be repaired by shoreside workers rather than the ship's crew. Like Tinsley, the chief mate took no precautionary measures to eliminate the danger posed by the places where the sheathing was broken. He went into the hold to inspect rat traps required by government regulations, and was injured when he fell through a hole in the sheathing. The court of appeals affirmed the district court's holding that:

> [The Chief Mate] failed to fulfill his responsibilities as the vessel's safety officer and specifically failed to properly inspect the sheathing where his accident occurred. If he had properly performed an inspection and corrected the condition, as it was his duty to do, no accident would have occurred. The Chief Officer's faults in these respects constitute a breach of his contractual duty to defendant to properly perform his duties, and bar him from any recovery under the theory of unseaworthiness (citing Walker v. Lykes Bros.). 457 F.2d at 153, n. 2 (citing the district court's decision).

Stanworth involved a chief mate who discovered that diesel oil had spilled onto the deck of a fishing trawler, and ordered the chief engineer to clean it up. He later inspected the spill area and slipped on a patch of oil which had been missed. In holding that the chief mate was not barred from recovering for his injuries, the court of appeals stated that:

> In Reinhart . . . the accident was due to some broken and damaged sheathing about which Reinhart was aware. Although as Chief Mate he had a duty to the owner to have the sheathing in safe condition, he failed to take any action. In the present case, Stanworth had not only directed the unsafe condition to be eliminated, he was in the process of inspecting the clean-up activities when he was injured. Rather than in breach of his safety maintenance duty (as was Reinhart), he was in the process of carrying out that responsibility when the accident occurred. 523 F.2d at 47, citing Dixon, 219 F.2d at 11-12, 16, 17.

Tinsley was the opposite of Stanworth, in that he made no attempt to avoid or correct any danger created by the stowage of containers on a stacking frame which lacked a built-in catwalk. He was instead like Reinhart, Walker, and

Peymann, in that he was injured by a condition which he had ignored.

In the recent case of Bulla v. Sea-Land Service, Inc., No. 91-3204 (E.D.Pa.1993), a chief mate was injured in circumstances very similar to those of the present case. The chief mate had used an aluminum ladder to climb to the temperature gauge on a second-tier container. He then attempted to reach the gauges on adjacent containers by using lashings and other handholds to move laterally across the containers instead of using the ladder. He fell while doing so, and sued to recover for the resulting injuries. The court denied the chief mate's claims because "The plaintiff had a duty to take the temperatures in a safe way, and there is no evidence that anything the defendant did precluded his doing so." The legal standard applied by the court may not have been appropriate for an ordinary seaman, but it was certainly appropriate for the chief mate. Similarly, in Maersk Line, Ltd. v. Bernard, No. 91-3861 (C.D.Ca.1992), a chief

cook filed suit against the shipowner for injuries which he received when a box of food fell from a shelf in the vessel's freezer because it had been negligently stowed. The chief cook's position in the food storage area was analogous to that of Tinsley on deck, in that he was the officer in charge of safe stowage in the freezer. The court dismissed the chief cook's claim because his injuries were caused solely by his breach of the duties of his office.

In summary, if the absence of third-tier catwalks was indeed a dangerous condition, the danger was never communicated to the shoreside managers who could have ordered the condition to be corrected. The reason for this lack of notice is that Tinsley failed to fulfill his duty as chief mate. Moreover, Tinsley's breach of duty was an egregious pattern of continuous neglect over a substantial period of time involving hundreds of container readings. It is true that the shipowner's duties are non-delegable in the sense that the shipowner cannot hide behind the fault of an officer

when an action is brought by another seaman. However, the officer should not be allowed to recover when he acquiesces in a condition which the shipowner relied upon him to correct or report, and complains that the condition is dangerous only when he commences a lawsuit. In failing to recognize the higher standard applicable because of Tinsley's status as the officer on the ship in charge of the condition which caused his injury, the Ninth Circuit erred as a matter of law.

III.

THE NINTH CIRCUIT ERRED IN AFFIRMING THE AWARD OF POST-JUDGMENT INTEREST FROM A TIME WHEN SEA-LAND'S LIABILITY HAD NOT YET BEEN ESTABLISHED.

Post-judgment interest is governed by 28 U.S.C. §1961(a), and does not accrue under §1961(a) from the date of a judgment which is found to be legally insufficient. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990). It accrues instead from the date of the judgment on remand. Id. The

Ninth Circuit acted contrary to the dictates of Bonjorno in affirming the award of post-judgment interest from the date of the District Court's original judgment.

In Bonjorno, the Supreme Court considered the accrual date of interest on a judgment which was later modified. The Court held that post-judgment interest does not begin to accrue until the amount of damages is finally determined. The Court stated:

> [T]he purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between ascertainment of the damages and the payment by the defendant. Where the judgment on damages was not supported by the evidence, the damages have not been "ascertained" in any meaningful way. It would be counterintuitive, to say the least, to believe that Congress intended post-judgment interest to be calculated from such a judgment.

110 S. Ct. at 1576 (emphasis added, citations omitted).

The Ninth Circuit ruled that the accrual of post-judgment interest from the original judgment was consistent with Bonjorno because "the district court's determination of

damages was not challenged...." Slip opinion, p. 13576 (emphasis added). In other words, the Ninth Circuit construed Bonjorno to apply only to the amount of recovery, and not liability.

Sea-Land submits that while the specific facts of Bonjorno may have involved the quantum of damages, the holding in Bonjorno must be understood to refer to the legal obligation of the defendant to compensate the plaintiff. That obligation encompasses both liability and amount. The defendant has no obligation to compensate the plaintiff, and therefore no obligation to pay post-judgment interest, if the plaintiff's damages are not ascertained. Equally, the defendant has no obligation to compensate the plaintiff, and no obligation to pay post-judgment interest, if the plaintiff's damages resulted from a cause for which the defendant is not liable. As the Supreme Court stated in Bonjorno, "It would be counterintuitive, to say the least," to believe that while Congress did not intend post-judgment interest to run

from a judgment in which the amount of recovery was not ascertained, it intended post-judgment interest to run from a judgment in which liability was not ascertained. See 459 U.S. at 835-36.

Although the Ninth Circuit affirmed as not clearly erroneous the district court's judgment on remand that liability should be apportioned 90% to Sea-Land, that does not mean that liability was ascertained at the time of the original judgment. The Ninth Circuit's affirmation of the judgment on remand cannot apply retroactively to a time before that judgment was entered.

Sea-Land contended on remand that it could have avoided Tinsley's injury entirely by instructing Tinsley not to read the third-tier containers if Tinsley had reported the dangerous condition. Sea-Land's West Coast fleet manager gave undisputed testimony at trial that whenever the vessel had containers at locations where there were no catwalks, care was taken to place the hard-frozen loads in those

locations. He testified specifically that the reason for doing so was that the hard-frozen containers did not have to be monitored. That testimony would have been sufficient to sustain as not clearly erroneous a finding that Tinsley's injuries were caused solely by his own negligence, and that Tinsley was not entitled to recover.

Sea-Land also contended that it could have avoided Tinsley's injury by prewelding a catwalk to a third-tier stacking frame for use on the few voyages when containers were stowed on the third-tier at Hatch No. 4. In support of that contention, Tinsley himself testified that the vessel had third-tier catwalks at Hatches 8 and 9, and a catwalk could just as easily have been attached at the third tier of Hatch No. 4. Tinsley's testimony was supported by that of other witnesses who said that catwalks were constantly taken off, repaired, and replaced on the vessel, and that a catwalk could have been welded to a stacking frame for use between the second and third tiers at Hatch No. 4 as readily as at

other locations on the vessel. The record also contained substantial evidence of safety meetings and related actions demonstrating Sea-Land's responsiveness to safety concerns. The oral testimony and safety meeting records would likewise have been sufficient to sustain as not clearly erroneous a finding that Tinsley's failure to report the dangerous condition was the sole cause of his injuries.

In summary, the District Court found in its original judgment that Tinsley's failure to report the danger which he perceived from the absence of third-tier catwalks was not negligent. As a result, the District Court did not consider the extent to which Tinsley's injuries may have been caused by his failure to report the perceived danger. The Ninth Circuit reversed the District Court and held that Tinsley was negligent in failing to report the perceived danger. The Ninth Circuit concluded specifically that while Sea-Land knew of the condition, it would not have appreciated the danger created thereby in the absence of notice from

Tinsley. The Ninth Circuit instructed the District Court to consider on remand the extent to which Tinsley's injuries were caused by his failure to inform Sea-Land of the danger which he perceived. Looking at the facts from that new point of view, the District Court might well have decided that Tinsley's failure to report the perceived danger was the sole cause of his injuries, and stood as a complete bar to recovery. Such a finding would have been supported by the evidence. The fact that the District Court chose to apportion causation to Sea-Land, and the District Court's decision was later affirmed as not clearly erroneous, cannot be used retroactively to conclude that Sea-Land's liability was ascertained at the time of the original judgment.

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,

JEROME C. SCOWCROFT
Counsel of Record

Of SCHWABE, WILLIAMSON,
FERGUSON & BURDELL
Attorneys for Petitioner

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

92-1868

No. 93-__

In the Supreme Court
OF THE
United States

July Term, 1993

SEA-LAND SERVICES, INC.

Petitioners,

vs.

CLARENCE F. TINSLEY and MARION TINSLEY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JEROME C. SCOWCROFT
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15pp

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ENTERED ON
MAR 28 1989

FILED ON
MAR 27 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY and MARION TINSLEY, his wife,	
Plaintiff,	NO. C88-190T
-vs-	
SEA-LAND CORPORATION, a corporation,	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendant.	

THIS MATTER having come on regularly for trial to the court sitting in admiralty on March 20, 1989. Harold F. Vhugen and Ronald J. Bland of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz appeared as counsel for plaintiffs and Paul N. Daigle and Bert W. Markovich of

Schwabe, Williamson, Wyatt & Lenihan appeared for the defendant. At the close of the evidence, the case was argued by counsel and submitted to the court for consideration and decision.

The court makes the following Findings of Fact and Conclusions of Law and orders Judgment be entered in accordance herewith.

FINDINGS OF FACT

1. Plaintiffs Clarence F. Tinsley and Marion Tinsley, his wife, at all times material were and are residents of the Western District of Washington residing at Arlington.

2. Defendant Sea-Land Corporation is a foreign corporation licensed to do business and actually doing business in the Western District of Washington with its principal offices at Tacoma.

3. At all times material, defendant Sea-Land Corporation was the owner and operator of the SS

GALVESTON on which plaintiff Clarence F. Tinsley served as chief mate.

4. On September 5, 1987, while in the course of his duties as chief mate aboard the SS GALVESTON, plaintiff fell while attempting to record temperatures on refrigerated cargo vans stowed three tiers high at the #4 hatch aft. Plaintiff fell and landed on a catwalk grating affixed to the stacking from supporting the second tier.

As chief mate plaintiff was required, by defendant, to personally check refrigerated van temperatures twice daily, and on September 5, 1987 he was injured in the course of carrying out this assignment with respect to such a van stowed on the third tier at #4 hatch aft.

5. At all times material there was no catwalk affixed to the stacking me supporting the vans on the third tier of hatch #4 which rendered access to the refrigerated vans precarious and dangerous and thus unseaworthy.

6. Plaintiff's injuries were proximately caused by the unseaworthiness of the vessel in that defendant failed to provide a safe and reasonable access to the reefer vans on the third tier at hatch #4.

7. The installation of a catwalk to the stacking frame supporting the third tier was shoreside work and was not part of plaintiff's responsibility or duties.

8. As a result of the unseaworthiness of the vessel as aforesaid plaintiff suffered multiple traumatic injuries impacting his head, neck, back, right knee and left ankle.

9. Plaintiff continued in the service of the vessel until it returned to Puget Sound three days later, at which point he was seen by Dr. Jeffrey Remington, an Edmonds orthopedic specialist on September 9, 1987. Plaintiff was next treated by his family physician, Dr. Jonathan Zend of Edmonds on September 21 1987.

10. Following Dr. Remington's assessment, plaintiff returned to the service of the vessel and remained on the

GALVESTON until the vessel laid up on or about October 11, 1987, at which point plaintiff returned to the care of Dr. Jonathan Zend, his family physician.

11. Plaintiff was subsequently referred by Dr. Zend to Dr. Stewart Scham, an orthopedist, who carried out arthroscopic surgery on plaintiff's right knee on February 23, 1988 at Stevens Memorial Hospital, Edmonds. In September of 1988, Dr. Zend referred the plaintiff to Dr. Robert A. Prosser, a neuropsychologist, who carried out a neuropsychological evaluation on September 7, 1988.

12. The preponderance of the medical evidence indicates that as a proximate result of his September 5, 1987 fall aboard the SS GALVESTON, plaintiff suffered a traumatic head injury affecting his vision, memory, concentration and cognitive function as well as injury to his neck, upper back, right knee and left ankle.

13. The totality of plaintiffs traumatic injuries permanently disabled him from returning to his life long occupation as a merchant seaman and deck officer.

14. Clarence F. Tinsley's date of birth is July 16, 1928. On the date of his injury, (September 5, 1987), he was 59 years of age. He is presently 60 years of age and, according to standard tables of mortality, has a life expectancy of 17.51 years.

15. Plaintiff has not been gainfully employed as a merchant seaman since leaving the service of the SS GALVESTON in October 1987. His taxable earnings as a deck officer in the years 1983 through 1987 are as follows:

Year	Earnings
1983	$51,592.33
1984	$57,591.53
1985	$47,736.57
1986	$63,235.69
1987	$45,316.68

(Plaintiff was disabled from April 29, 1987 to July 25, 1987 convalescing from heart bypass surgery and did not work from October 11, 1987 for the balance of the year.)

16. According to defendant's working agreement with the Masters, Mates Pilots union to which plaintiff belongs, the daily base wage for a chief mate on C-4 vessels such as the GALVESTON as of September 1987 was $120.17 per day. This was per day. This was increased to $128.77 effective July 1, 1988 and on July 1, 1989 it is scheduled to increase to $132.63. In addition, according to the agreement, in September of 1987 a chief mate was entitled to twenty-two days paid vacation per month worked. This was increased to twenty-four days on July 1, 1988 and is scheduled to increase to twenty-six days effective July 1, 1989.

17. The daily base wage for chief mates on Class A-2 vessels which replaced the C-4s was $152.03 per day

effective July 1, 1988, and is scheduled to increase to $156.59 effective July 1, 1989.

18. According to the Sea-Land working agreement, the employer is required to fund an Individual Retirement Account Plan (IRAP) equal to 5% of the employee's base wage including vacation days as well as the Masters, Mates and Pilots Pension Plan at a rate equal to 13% of the employee's base wage, including vacation days.

19. According to U.S. Department of Labor Bureau of Labor Statistics, Special Labor Force Report published September 1985, the average number of remaining years of labor force participation for a male age 60 is 5.8 years.

20. Following plaintiffs injury on September 5, 1987, defendant has paid for medical and hospital care in the total sum of $11,386.97. An itemized list of paid medical expenses (cure) paid through December 1988 is as follows:

Stevens Memorial Hospital	$593.00
Jeffrey P. Remington, M.D.	230.00
Richard A. Crone, M.D.	242.00
Dr. Jonathan Zend	3,780.00

Prescriptions	987.79
Stevens Radiologists	486.50
Stewart Scham, M.D.	1,963.00
Stevens Memorial Hospital (arthrogram, 2/10/88)	146.00
Stevens Memorial Hospital (surgery, 2/24/88)	1,625.20
Cyto Lab, Inc.	20.00
Thoms J. Degan, M.D.	83.00
Crutches	40.48
Suburban Anesthesiologists (knee surgery, 2/24/88)	480.00
Robert A. Prosser, Ph.D (neuropsychological evaluation)	710.00
TOTAL	$11,386.97

21. Plaintiff's economic loss, including lost earnings, fringe benefits and non-market services since October 11, 1987 to date, based upon his recent earnings history as chief mate, and after allowance for anticipated federal income tax, totals $97,954.00.

22. The court has taken into account the fact that the economist, Dr. Eugene Silberberg, based his economic loss estimates from the date of plaintiff's injury, September 5, 1987, rather than October 11, 1987, the date plaintiff last

worked. The court has therefore, reduced plaintiff's net economic loss to $97,954.00, $10,000.00 less than Dr. Silberberg's estimate, which is otherwise accurate.

23. Plaintiff's future economic loss, including lost earnings, impaired earning capacity and inability to perform non-market services reduced to present value and after allowance for anticipated federal income tax, totals $448,659.00 based upon an anticipated work expectancy of 5.63 years.

24. Plaintiff Clarence F. Tinsley is entitled to general damages for pain, suffering, disability and loss of enjoyment of life in the sum of $150,000.00.

25. Plaintiff Marion Tinsley is entitled to an award of $25,000.00, for loss of consortium secondary to her husband's injuries and disabilities.

26. Defendant's contention that plaintiff, in the absence of a catwalk, should have utilized portable ladders and stagings to access the third tier refrigerated vans is

rejected as neither practical nor reasonable under the prevailing circumstances. Such methods were not employed on the GALVESTON or an comparable Sea-Land container vessels.

27. At all times material herein, plaintiff Clarence F. Tinsley acted with reasonable care under all of the facts and circumstances.

From the Foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this court pursuant to 46 U.S.C. §688, 28 U.S.C. §1333(l), the general maritime law, and Rule 9(h) of the Federal Rules of Civil Procedure. Venue is proper.

2. All Findings of Fact more appropriately termed Conclusions of Law will be incorporated as such.

3. Defendants ship, the SS GALVESTON, was at all times material herein, unseaworthy at hatch #4.

4. That the unseaworthy condition was the proximate cause of plaintiffs injuries and damages.

5. That plaintiff, Clarence F. Tinsley was not negligent on September 5, 1987.

6. Plaintiffs are entitled to Judgment in their favor and are hereby awarded judgment as follows:

Economic loss (the total of Findings of Fact 21 and 23, supra)	$546,613.00
General damages for pain, suffering and disability	150,000.00
Loss of consortium (Marion Tinsley)	25,000.00
TOTAL DAMAGES	$721,673.00

7. The clerk of the court shall enter judgment in favor of plaintiff.

DATED at Tacoma, Washington, this 24th day of March, 1989.

/s/ Jack S. Tanner
UNITED STATES DISTRICT JUDGE

FILED
OCT 29 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

CLARENCE F. TINSLEY, et al.,	)	No. 89-35278
Plaintiff-Appellee,	)	No. CV 88-190-JET
SEA-LAND CORPORATION,	)	MEMORANDUM*
Defendant-Appellant.	)	

Appeal from the United States District Court
Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
August 7, 1990
Seattle, Washington

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: WRIGHT, BEEZER and TROTT, Circuit Judges

Sea-Land Corporation appeals a district court judgment holding it liable to Clarence Tinsley for injuries he sustained as a result of an unseaworthy condition on one of its vessels. We affirm in part, but reverse the court's decision that Tinsley was not comparatively negligent. We remand for a determination of the percentage that Tinsley was at fault for failing to report the unseaworthy condition. The damages already awarded shall be reduced by the percentage of blame assignable to Tinsley.

Clarence Tinsley served as chief mate on the SS Galveston, a ship owned and operated by Sea-Land Corporation. At the time of plaintiff's accident, the Galveston was transporting refrigerated cargo vans ("reefers") from Kodiak, Alaska to Tacoma, Washington. As chief mate, plaintiff was required to make periodic checks of the temperature in each reefer. While involved in that task, he sustained injuries which gave rise to this suit in admiralty.

On September 5, 1987 plaintiff mounted the ladder of a reefer stack near hatch #4 to check the temperature gauge on the third-tier unit. A catwalk had been installed at the second tier, but not at the third tier, to which plaintiff was climbing. As he neared the top of the second reefer, plaintiff reached for the bottom rung of the third-tier ladder and in doing so-hit his head on the protruding frame separating the two reefer levels. The bump caused him to lose his balance and fall to the surface of the second-tier catwalk, where he was injured.

Plaintiff sued under the Jones Act, 46 U.S.C. § 688 (1988), arguing Sea-Land was negligent, and under general maritime law, claiming the absence of a third-tier catwalk at hatch #4 rendered the Galveston unseaworthy. He further alleged that the unseaworthy condition was the sole cause of his injuries. The district court agreed the Galveston was unseaworthy and awarded damages of $721,673.00. Sea-Land timely appeals.

I.

THE "PRIMARY DUTY" DEFENSE

The existence and extent of a duty is reviewed de novo. Armstrong v. United States, 756 F.2d 1407, 1409 (9th Cir. 1985).

It is a principle of maritime law that an employer's "duty to provide a seaworthy ship is absolute and non-delegable." Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1014 (9th Cir. 1966); accord Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 94 (1946); Norris, 2 The Law of Maritime Personal Injuries, §§ 298-303 (3rd ed. 1975). Assumption of risk and contributory negligence are not defenses; rather, a plaintiff's negligence is only relevant to mitigate damages. Seas Shipping, 328 U.S. at 94-95; Hudson Waterways, 365 F.2d at 1014-1015. The seaworthiness doctrine was founded on the belief that, because seamen must expose themselves to obvious dangers, taking orders even when the risk of injury is great, it would be unfair for

ship owners to be able to hide behind the defenses typically available to employers on dry land. A narrow exception to this general principle, called the "primary duty rule," or the "Walker doctrine," was first stated in 1952.[1] The primary duty rule rarely has been applied to deny recovery, however defendant seeks to bring the present case within its ambit.

Judge Learned Hand first articulated the rule in Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2d Cir. 1952), holding that recovery is barred if a seaman's injuries were due to his breach of "a duty which [he] consciously assumed as a term of his employment." Id. at 773. The Second Circuit refined the rule three years later, stressing that the duty alleged to have been breached must be "independent" of the normal tasks expected of the particular seaman. Dixon v. United States, 219 F.2d 10, 16 (2d Cir. 1955). As the court explained:

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[1]See generally, 1B Benedict on Admiralty §25 (6th ed. 1989).

> [The] result turns really not upon any question of "proximate cause," "assumption of risk" or "contributory negligence," but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.

Id. at 16-17 (emphasis supplied). This narrow construction has been adopted by the Ninth Circuit. California Home Brands. Inc. v. Ferreira, 871 F.2d 830, 836 n.3 (9th Cir. 1989) ("In order for the primary duty rule to apply, the employee must have failed to perform a specific, positive duty for which he had primary responsibility.") (emphasis in the original); Hudson Waterways, 365 F.2d at 1015.

Sea-Land contends that plaintiff, as chief mate, had a primary duty to alleviate the unseaworthy condition created by the absence of a catwalk, relying principally on Reinhart v. United States, 457 F.2d 151 (9th Cir. 1972), one of the few decisions barring recovery on primary duty grounds. The plaintiff in Reinhart, a chief mate, was responsible for spotting defects in wooden sheathing placed in the hold of

the vessel to prevent bombs stored below from coming into contact with the metal hull. He also was responsible for rat inspection. While searching for rats plaintiff fell through a hole he had neglected to spot in the sheathing. The court held the breach of his primary duty to check accurately the sheathing barred any recovery. Over the dissent of Judge Choy, the majority found irrelevant that (1) the actual repair of defective sheathing was the responsibility of home port stevedore, and (2) plaintiff could not have corrected the problem himself. The court emphasized plaintiff's duty had been to inspect for damage, and that plaintiff's failure to do so was the cause of his injuries. Sea-Land urges us to hold that Tinsley's failure to report the absence of the catwalk constituted a breach of a primary duty, even though it was not within his power to install a catwalk himself.

Our most recent formulation of the primary duty rule is found in California Home Brands, 871 F.2d at 835-36. Finding the rule inapplicable in that case, the court held:

"[i]n order for the primary duty rule to apply, the employee must have failed to perform a specific, positive duty for which he had primary responsibility." Id. at 836 n.3. (emphasis added to the word "specific"). Drawing on Walker and Dixon, the court made clear that the duty alleged must be specific. As Learned Hand explained in Walker, the duty must be "consciously assumed as a term of employment." Walker, 193 F.2d at 773. According to Judge (later Justice) Harlan, the duty must be so clearly delineated that, if breached, the employer would have a cause of action against the employee. Dixon, 219 F.2d at 16-17.

By contrast, plaintiff in the present case was told in a highly generalized way that he was responsible for maintaining a safe ship. He was never instructed to make reports detailing where he perceived catwalks were needed. The primary duty rule covers only those situations where the failure to undertake an explicitly assigned duty backfires on the very person who was inattentive to it--where the

connection between the seaman's negligence and his own mishap is so strong as to justify a total bar to recovery.[2]

If we were to accept Sea-Land's position, seamen with broad responsibilities like plaintiff would rarely recover in tort; ironically, they would be responsible for nearly every unseaworthy condition causing them harm. Moreover, ship owners would have an incentive to broadly define the duties of their seamen, with the effect that an assumption of risk standard would begin to prevail in maritime law. Such an outcome would contradict the basic principle that a ship owner's duty to provide a seaworthy ship is absolute and nondelegable.

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[2]For instance, to state the archetypal case where the primary duty rule would apply: "[if] a seaman had spilled oil and then, rejecting an opportunity to wipe it up, had walked in it, it would shock the conscience to allow him to recover." Peymann v. Perini Corp., 507 F.2d 1318, 1322 (1st Cir. 1974), cert. denied, 421 U.S. 914 (1975). The present case is far removed from this type of scenario.

For these reasons, we hold that California Home Brands, not Reinhart, controls this case and that the primary duty rule is inapplicable.

II

THE LACK OF CAUSALITY CLAIM

Questions of causality are fact-based and thus are reviewed for clear error. Armstrong v. United States, 756 F.2d 1407, 1409 (9th Cir. 1985); see also, Trinidad Corp. v. SS Keiyoh Maru, 845 F.2d 818, 822 (9th Cir. 1988) (admiralty court's findings of fact reviewed under clearly erroneous standard). We must affirm unless we are left with a "'definite and firm conviction that a mistake has been committed.'" Trinidad Corp., 845 F.2d at 822 (quoting In re White Cloud Charter Boat Co., Inc., 813 F.2d 1513, 1517 (9th Cir. 1987)). No such mistake was committed here.

Sea-Land argues that the absence of a catwalk on the third tier at hatch #4 is irrelevant since plaintiff fell from a point below where a catwalk would have been, not while he

was attempting to read the temperature gauge. The district court found, however, that the absence of a catwalk did cause plaintiff's injury since the catwalk serves the additional function of providing safer access to the next reefer level up. It is not just a gangplank running from the ladder across the base of the reefer; rather, it has a protective frame through which one would pass before rising onto the grating. This frame would have caught Tinsley as he fell backwards. As stated in the district court's findings of fact:

> 5. At all times material there was no catwalk affixed to the stacking frame supporting the vans on the third tier of hatch #4 which rendered access to the refrigerated vans precarious and dangerous and thus unseaworthy.
> 6. Plaintiff's injuries were proximately caused by the unseaworthiness of the vessel in that defendant failed to provide a safe and reasonable access to the reefer vans on the third tier at hatch #4.

(emphasis supplied). As plaintiff demonstrates, the record supports the conclusion that a catwalk would have made it safer to climb around the stacking frame, up to the level where the actual "walk" (or gangplank) would have been in

place. We affirm the district court on this point because its findings of fact appear correct, and certainly were not clearly erroneous.

III.

THE PERMANENT DISABILITY CLAIM

The district court's finding that plaintiff was permanently disabled as a result of his fall is an issue of fact, and is therefore reviewed for clear error. Trinidad Corp., 845 F.2d at 822.

Sea-Land contends the district court erred in finding that plaintiff was permanently disabled. It points primarily to differing expert testimony on the subject of disability. The testimony of neither team of experts appears inherently incredible; nothing indicates that one side clearly was right and the other wrong. Thus, we uphold the court's decision to accept the conclusions of plaintiff's experts, notwithstanding Sea-Land's credibility attacks. SEC v.

Rogers, 790 F.2d 1450, 1455 (9th Cir. 1986) (special deference owed to district court's credibility determinations).

IV.

THE DISTRICT COURT'S REFUSAL TO HEAR TESTIMONY

The district court refused to hear the testimony of a Sea-Land employee who would have stated that plaintiff spoke to him after his fall concerning the settlement of an unrelated heart attack claim, and that at this meeting plaintiff asked to be reassigned to another ship or to other duties until he retired. Sea-Land argues Tinsley's inquiry about other work contradicts his claim of being permanently disabled, and that this testimony went to the heart of its case. It therefore asks for a new trial based on the alleged error.

We review a district court's evidentiary rulings for an abuse of discretion, and will not reverse absent prejudice. Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir. 1989). In the present case, the district court allowed

defense counsel to offer proof concerning what the testimony of the witness would be. After this colloquy, the court was satisfied the testimony would not add to the trial. The record confirms the testimony would have added little. There was already considerable evidence indicating plaintiff was not faking his injuries and that he was indeed permanently disabled. We therefore find the district court did not abuse its discretion, and that even if it did, withholding the employee's testimony did not materially prejudice Sea-Land's case.

V.

THE COMPARATIVE NEGLIGENCE CLAIM

Finally, Sea-Land argues plaintiff was negligent and that his comparative fault should offset the district court's damage award. The district court's finding that plaintiff was not negligent must be affirmed unless clearly erroneous. Trinidad Corp., 845 F.2d at 822. We hold the court's finding was clearly erroneous.

Sea-Land asserts Tinsley was comparatively negligent because he failed to: (1) devise a safer means of climbing to the third tier of hatch #4, (2) invoke the company directive stating seamen should not climb reefer stacks in dangerous conditions, and (3) report the unseaworthy condition created by the absence of a catwalk. The first two theories are without merit. As to the first, the district court expressly found, based on credible evidence, that a temporary rigging device would have been impracticable, if not unsafe. As to the second, the company directive only authorized Tinsley to abstain from checking reefer temperatures in circumstances such as heavy weather. Under normal conditions, he was expected to climb all reefer stacks, including those without third-tier catwalks.

Whether plaintiff was comparatively negligent in failing to report the unseaworthy condition created by the absence of a catwalk is a different question. Courts generally are reluctant to find seamen negligent in

situations where they have been ordered to carry out dangerous assignments. Under maritime law, the defense of contributory negligence requires evidence of same negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition." Tolar v. Kinsman Marine Transit Co., 618 F.2d 1193, 1196 (6th Cir. 1980); accord Akermanis v. Sea-Land Service, Inc., 688 F.2d 898, 904 n.2 (2d Cir. 1982), cert. denied, 464 U.S. 1039 (1984); Furka v. Great Lakes Dredge & Dock Co. Inc., 755 F.2d 1085, 1090 (4th Cir. 1985), cert. denied, 484 U.S. 1042 (1988); CEJA v. Mike Hooks, Inc., 690 F.2d 1191, 1194-95 (5th Cir. 1982); Hall v. American S.S. Co., 688 F.2d 1062, 1065-66 (6th Cir. 1982); Joyce v. Atlantic Richfield Co., 651 F.2d 676, 682-83 (10th Cir. 1981).

Beyond mere acceptance of a dangerous condition, Tinsley was negligent in failing to report that climbing to the third tier was unsafe without a catwalk. When a seaman confronts a condition he knows to be dangerous,

and when he does so on a recurring basis, he may be held negligent for not reporting that condition to his superiors. DuBose v. Matson Navigation Co., 403 F.2d 875, 878-79 (9th Cir. 1968); 1B Benedict on Admiralty § 25 (6th ed. 1989).[3] DuBose involved a suit by a scullion whose leg was injured when other workers repeatedly bumped into him as they carried dishes to be washed. Instead of reporting the problem, plaintiff endured being bumped into for three months, until he finally had to be hospitalized. We affirmed the district court's denial of recovery, holding that plaintiff was

> negligent in not setting in motion circumstances which would bring about a change of conditions, namely, informing his superiors of the bumps he had been receiving so that they could change the course of the dish-runners. Of course, whether appellant had a duty to so inform his

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[3]Rivera v. Rederi A/B Nordstjernan, 456 F.2d 970, 974 (1st Cir.), cert. denied, 409 U.S. 876 (1972); Rivera v. Farrell Lines, Inc. 474 F.2d 255, 258 (2d Cir.), cert. denied, 414 U.S. 822 (1973); Mroz v. Dravo Corp., 429 F.2d 1156, 1164 (3d Cir. 1970); Estate of Larkins v. Farrell Lines, Inc., 806 F.2d 510, 514 (4th Cir. 1986), cert. denied, 481 U.S. 1037 (1987); Savoie v. Otto Candies, 692 F.2d 363, 372 (5th Cir. 1982).

> superiors depends upon whether it can be said, as a matter of law, that his continuing to work under the aforesaid conditions created "an unreasonable risk of injury to himself." Kulukundis v. Strand, 202 F.2d 708, 711 (9 Cir. 1953).

DuBose, 403 F.2d at 878 (emphasis in original).

It is conceded in this case that plaintiff knew for quite some time that he was working under an unsafe condition, and that he did not report it to his superiors. Under the circumstances, we find this condition created an unreasonable risk of injury to Tinsley. Moreover, the defect in the ship was rectifiable; plaintiff was not confronted with a general seafaring risk of the kind courts have excused seamen from reporting--such as having to go on deck during a violent sea. Thus, although Tinsley's failure to report the lack of a catwalk at hatch #4 did not constitute a violation of a primary duty, we hold it did constitute negligence.

We address one additional point. The Second Circuit has adopted a narrow exception to the general rule

of comparative negligence. Where the defect is obvious, no report should be required because the seaman's superiors presumably are aware of the problem. The Second Circuit arrived at this conclusion, distinguishing DuBose, in a case where the danger of a slippery floor was "immediately obvious to superiors." Rivera v. Farrell Lines, Inc., 474 F.2d 255, 258 (2d Cir.), cert. denied, 414 U.S. 822 (1973); Guerrero v. American President Lines, Ltd., 394 F.Supp. 333, 336 (S.D.N.Y. 1975). We believe this exception does not apply to the instant case.

Sea-Land's management undoubtedly knew catwalks were not installed at each level of all reefer stacks, but that fact alone tells us little. The crucial question is whether the absence of a catwalk at hatch #4 should have been perceived by Tinsley's superiors as an obvious danger. We believe the danger was obvious only to seamen like Tinsley, who climbed the reefer stacks on a daily basis, and who were thus familiar with all the

acrobatics involved in reaching the temperature gauges of those reefers which were not equipped with catwalks. The danger of the situation was discoverable only in the climb itself, not by casual observation. This is not, for instance, the case of a deck smeared with oil, or a hole in the hull, where the unseaworthy condition is immediately recognizable as unsafe by all concerned. The danger here was only obvious to those initiated in the rites of reefer climbing. We therefore find Tinsley is not excused from his failure to report the unseaworthy condition.

VI.

CONCLUSION

On remand, the district court shall determine the extent to which Sea-Land's liability is offset by Tinsley's negligence, and shall reduce the damage award already calculated according to the percentage of his fault. We emphasize, however, that our opinion should not be read to express a view on what amount of reduction is

appropriate. The district court shall examine this question independently.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Honorable Jack E. Tanner

Filed/Lodged/Received
May 29 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLARENCE F. TINSLEY and MARION TINSLEY, his wife,	
Plaintiffs,	CA No. 89-35278 DC No. C88-190JET
v.	SUPPLEMENTAL FINDINGS OF FACT
SEA-LAND CORPORATION,	AND CONCLUSIONS OF LAW
Defendant.	

THIS MATTER having come on partial remand from the Court of Appeals, having previously been tried to the court sitting in admiralty beginning on March 20, 1989, Harold F. Vhugen and Ronald J. Bland, of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz,

appeared as counsel for plaintiffs, and Paul N. Daigle and Bert W. Markovich, of Schwabe, Williamson, Wyatt & Lenihan, appeared for the defendant. At the conclusion of the trial, findings of fact and conclusions of law were entered on March 24, 1989 with judgment entered in favor of the plaintiffs in the amount of $721,673. Thereafter, the defendant appealed. In its memorandum opinion filed October 29, 1990, the Ninth Circuit Court of Appeals affirmed the trial court's findings in all respects except as to the plaintiffs' comparative fault for failing to report to his superiors the danger in climbing to the third tier at No. 4 hatch in the absence of a catwalk, remanding that issue alone to the trial court for reconsideration.

With respect to the issue of comparative fault, the court having heard oral argument on May 28, 1991, and having considered-the memoranda of both parties and the evidence presented at trial on this issue, now makes the following supplemental findings of fact and conclusions of

law and orders judgment to be entered in accordance herewith:

SUPPLEMENTAL FINDINGS OF FACT

1. Plaintiff was negligent in failing to report that climbing to the third tier of reefers at the No. 4 hatch of the GALVESTON was unsafe without a catwalk.

2. The percentage of Tinsley's negligence considering the totality of the circumstances, including but not limited to the unseaworthy condition created by the absence of the catwalk, is 10%.

From the foregoing supplemental findings of fact, the court now makes the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. Plaintiff Tinsley's comparative negligence under the circumstances was 10%.

2. Plaintiffs' former damage award of $721,673 is thereby reduced by 10% to $654,986.70.

3. Interest on the reduced judgment shall run from March 24, 1989, the date of the original judgment, at the then applicable statutory rate of 9.43%.

DATED at Tacoma, Washington, this 29th day of May, 1991.

/s/ Jack E. Tanner
U.S. DISTRICT JUDGE

Presented by:

LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN, BLAND & HOROWITZ
Attorneys for Plaintiff

By: /s/ Ronald J. Bland
RONALD J. BLAND
WSBA #2449

By: /s/ Harold F. Vhugen
HAROLD F. VHUGEN
WSBA #80

Approved as to form:
Paul N. Daigle (per telephone 5/29/91)
for Defendant

ENTERED
ON DOCKET

MAY 30 1991

FILED
MAY 30, 1991

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY
AND MARION TINSLEY,
HIS WIFE
v.

SEA-LAND CORP.

JUDGMENT IN A
CIVIL CASE

Case Number: C88-190T

☐ Jury Verdict. This action came before he Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial ~~or hearing~~ before the Court. The issues have been tried ~~and heard on~~ a decision has been rendered.

IT IS ORDERED AND ADJUDGED

PLAINTIFFS' FORMER DAMAGE AWARD OF

$721,673 IS REDUCED BY 10% TO $654,986.70.

INTEREST ON THE REDUCED JUDGMENT SHALL RUN FROM 3/24/89, AT THE THEN APPLICABLE RATE OF 9.43%.

Date 5/30/91

Clerk BRUCE RIFKIN

/s/ Debby Harrison
(By) Deputy Clerk

ENTERED
ON DOCKET
JUL 11 1991

FILED JUL 11 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY and MARION TINSLEY, his wife, Plaintiff,	NO. CSS-190T
-vs-	SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
SEA-LAND CORPORATION, a corporation, Defendant.	

THIS MATTER comes on before the above-entitled Court upon partial remand from the United States Court of Appeals for the Ninth Circuit, having previously been tried to the court sitting in admiralty beginning on March 20, 1989. Harold F. Vhugen and Ronald J. Bland of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz, appeared as

counsel for plaintiffs, and Paul N. Daigle and Bert W. Markovich, of Schwabe, Williamson, Wyatt & Lenihan, appeared for the defendant. At the conclusion of the trial, Findings of Fact and Conclusions of Law were entered on March 24, 1989 with judgment entered in favor of the plaintiffs in the amount of $721,673.00. Thereafter, the defendant appealed. In its memorandum opinion filed October 29, 1990, the Ninth Circuit Court of Appeals affirmed the trial court's findings in all respects except as to the plaintiffs' comparative fault for failing to report to his superiors the danger in climbing to the third tier at No. 4 hatch in the absence of a catwalk, remanding that issue alone to the trial court for reconsideration.

With respect to eh issue of comparative fault, the court makes the following supplemental Findings of Fact and Conclusions of Law and orders judgment to be re-entered in accordance herewith:

SUPPLEMENTAL FINDINGS OF FACT

1. Sea-Land's contentions concerning comparative negligence as set forth in the pretrial order, though quite specific, make no mention o Tinsley's alleged failure to notify his superiors of the dangerous condition: to wit, the absence of a catwalk between the second and third tier at No. 4, suggesting that Sea-Land itself ascribed little or no significance to Tinsley's failure to report the condition and the issue was not raised at trial.

2. Captain Donald F. Miley, a retired skipper on Sea-Land container vessels, called as an expert on behalf of plaintiff, testified unequivocally that in the absence of a catwalk between the second and third tier at No. 4, he "would feel obliged to do it the same way Mr. Tinsley does."

3. Other crew members on the S.S. Galveston, including Boatswain Dawson, Electrician Bagley, Seaman Stolen, and Third Mate McKay all used the same means of access as plaintiff to reach the third tier reefer vans at No.

4 as had numerous chief mates and crew members in the past.

4. The specific condition which led to Tinsley's fall, the loading of a third tier reefer at No. 4 at Kodiak, was created by the marine department of Sea-Land at Kodiak, and because of the time involved, it was unlikely that defendant Sea-Land could have or would have installed a catwalk at this location had specific notice of the dangerous condition been given by plaintiff or others.

5. A decision to construct a catwalk between the second and third tiers at Hatch No. 4 would have had to have been made by fleet operations for Sea-Land with the approval of the Ship Construction Department in New Jersey, making it extremely unlikely that any remedial action could have or would have been taken had plaintiff notified his superiors before sailing from Kodiak on September 5, 1987.

6. Plaintiff Tinsley's comparative negligence under the facts and circumstances herein was a minimal cause of his injuries.

From the foregoing Supplemental Findings of Fact, the Court now makes the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. Plaintiff Tinsley's comparative negligence was 10% the cause of his injuries.

2. Plaintiffs' former damage award of $721,673 is thereby reduced accordingly.

3. Interest on the reduced judgment shall run from March 24, 1989, the date of the original judgment, based on Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973); Turner v. Japan Lines, 702 F.2d 752 (9th Cir. 1983).

DATED this 11th of JULY 1991 at Tacoma, Washington.

/s/ Jack E. Tanner
UNITED STATES DISTRICT COURT JUDGE

ENTERED
ON DOCKET
JUL 15 1991

FILED JUL 15 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARENCE F. TINSLEY and MARION TINSLEY, his wife, Plaintiff,	)	NO. C88-190T
-vs-	)	
SEA-LAND CORPORATION, a corporation, Defendant.	)	ORDER

THIS MATTER comes on before the above-entitled Court sua sponte.

Having considered the entirety of the records and file herein, and finding that Supplemental Findings of Fact and Conclusions of Law and Supplemental Judgment were entered herein on May 30, 1991, it is now

ORDERED that the Supplemental Findings of Fact and Conclusions of Law and Supplemental Judgement entered on July 11, 1991, are hereby vacated.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 15th day of July 1991.

/s/ Jack C. Tanner
UNITED DISTRICT COURT JUDGE

FILED
NOV 20 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE F. TINSLEY; MARION TINSLEY,	)
Plaintiffs-Appellees,	) No. 91-35762
v.	) D.C. No. CV-88-0190-JET
SEA-LAND CORPORATION, a corporation,	) MEMORANDUM*
Defendant-Appellant.	)

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted October 9, 1992
San Francisco, California

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R. 36-3.

Before: BROWNING, THOMPSON and KLEINFELD, Circuit Judges.

Sea-Land timely appeals the district court's determination of comparative negligence. We affirm for the reasons that follow. Sea-Land also appeals the district court's award of postjudgment interest from the date of the original judgment. We affirm this award in a separate published opinion.

I.

Sea-Land argues that the district court, contrary to our decision in the first appeal, improperly inferred Sea-Land was aware of the danger of reading third-tier temperature dials without a catwalk. While the district court judge did suggest he believed Sea-Land knew of the danger (ER 69), he acknowledged this court's contrary finding and that he could not overturn it. (ER 70-71). In any event, this court may affirm a district court's decision on any ground fairly

supported by the record, "even if the district court relied on the wrong grounds or wrong reasoning." Marino v. Vasquez, 812 F.2d 499, 508 (9th Cir. 1987). Even if the district court improperly considered Sea-Land's knowledge in determining comparative negligence, its finding that plaintiff was ten percent negligent is adequately supported by the remaining evidence. See Part III.

II.

Sea-Land argues the district court committed an error of law by allocating the most fault to the party least able to avoid injury. The cases Sea-Land relies on are inapposite. See DuBose v. Matson Navigation Co., 403 F.2d 875 (9th Cir. 1968); Superior Oil Co. v. Trahan, 322 F.2d 234 (5th Cir. 1963); Meintsma v. United States, 164 F.2d 976 (9th Cir. 1947). None of these cases involved a condition, like the one at issue here, that could not have been remedied without major structural changes. Trahan and Meintsma

involved failure to make a simple request for assistance. Meintsma, 164 F.2d at 977 (instead of jumping from the gangplank to the dock, plaintiff should have asked someone to lower it); Trahan, 322 F.2d at 237 (plaintiff should not have jumped from one moving vessel to another without requesting assistance). In Dubose, the defendant, had it known of the problem, could have avoided injury to a scullion who was repeatedly bumped by workers carrying dishes to be washed, simply by changing the route of those who carried the dishes. 403 F.2d at 878. In each of these cases, it was fair to assume the defendant would have responded had the plaintiff called the problem to the defendant's attention. In this case, by contrast, as we discuss below, the district court was not clearly wrong in finding it was unlikely that Sea-Land would have taken corrective action if Tinsley had reported the danger.[1/]

[1/]We relied on Dubose in the first appeal in support of the rule that failure to report a dangerous condition may bar recovery. As we note below, the district court's finding that Sea-Land would not have corrected the condition reduced the extent to which Tinsley's negligence

III.

The district court's assessment of comparative negligence was not clear error.[2/]

In ordinary negligence cases, the determination of comparative negligence requires an assessment of the relative fault of the parties. 4 Harper, James & Gray, The Law of Torts § 22.16 at 395-96 (2d ed. 1986). In such cases, the negligence of the parties is weighed without regard to the extent to which either party's conduct proximately caused the injuries. Id. Where a ship is found unseaworthy, however, the owner is strictly liable regardless of fault, Miles v. Melrose, 882 F.2d 976, 981 (5th Cir. 1989), and we compare causation rather than fault. Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129,

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contributed to his injuries.

[2/]Tinsley argues this court should not reach this issue because Sea-Land failed to raise it at trial and addressed it for the first time in the first appeal. The issue of Tinsley's contributory negligence was decided by the panel that heard SeaLand's first appeal without objection from Tinsley. Tinsley has waived any objection to consideration of this issue by failing to raise the objection in the first appeal.

1139 (9th Cir. 1977) ("'comparative causation' is a conceptually more precise term than 'comparative fault' since fault alone without causation does not subject one to liability") (citation omitted). See generally Schoenbaum, Admiralty and Maritime Law § 5-3 (1987); 4 Harper, James & Gray, The Law of Torts § 22.16 at 395-96, 399-400. The defendant bears the burden of proving the extent to which the plaintiff's negligence proximately caused his injuries. See Johnston v. Pierce Packing Co., 550 F.2d 474, 478 (9th Cir. 1977); see also 2 Norris, The Law of Seamen § 27:19 at 243 (4th ed. 1985).

Tinsley's failure to advise Sea-Land of the danger of reading third-tier temperature dials without a catwalk may have been a "but for" cause of his injuries. To determine whether this failure proximately caused Tinsley's injuries, however, a critical question remains to be answered; namely, whether Sea-Land, had it been warned by Tinsley, would have installed catwalks or relieved Tinsley of his obligation

to read third-tier temperature dials.[3/] While Sea-Land makes plausible arguments for blaming the accident more on Tinsley than Sea-Land, nevertheless the district court's determination must be upheld unless clearly erroneous. Accordingly, we review the record to see whether it supports the conclusion of the district court, subject to that highly deferential standard of review.

During the hearing on remand, the district court stated "[t]he problem is it's the last load in. And my experience in hearing these cases: once those kind [sic] of ships are loaded and lashed, they cast off those lines. [Defendant's attorney has] to argue: No, they wouldn't have done that; they would have built a catwalk." (ER 67). According to Sea-Land, this comment reveals the district court did not understand that catwalks could have been welded onto the stacking frames long before the ship was loaded. Sea-Land argues its

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[3/]Sea-Land's argument that it should be absolved of liability entirely because Tinsley was "in the best position to avoid the casualty" fails because it ignores this critical question.

prompt response to other concerns raised in monthly safety meetings demonstrates Sea-Land would have remedied the problem had the danger been reported. (Supp. ER).

It is not so clear, however, that Sea-Land would have built permanent third-tier catwalks for the frames. At trial, William Prindiville, Sea-Land's Region Manager of Fleet Operations, testified that permanent catwalks were a "continuous maintenance problem" and were not worth installing simply because they might be needed on a few voyages a year:

> They bang against the buttresses, they get smashed up when they get handled on the dock, they get damaged when they are stacked on top of each other on the vessel. So anytime there is a catwalk there, it is a struggle to maintain it in a safe working condition.
>
> Since we know we would be carrying reefers on the second tier of No. 4 on a regular basis, to have that catwalk on the upper stacking frame hanging over your head all 35 voyages of the year, when there is a need for it on those 5 voyages only, there would be a hazard to somebody working under there.

(Tr. 301-02).

While Sea-Land argues reports from periodic safety meetings indicate it was responsive to suggestions, the matters raised primarily involved minor repairs or simple requests, such as painting ladders yellow so they could be seen at night. On the other hand, the addition of a catwalk would have been a major structural change requiring approval of fleet operations and the ship construction department. (Tr. 310, 315). Accordingly, the district court was not clearly wrong in finding it was unlikely Sea-Land would have built either a permanent catwalk in advance or a temporary structure just before "cast off."

Similarly, the evidence as to whether Sea-Land would have relieved Tinsley of the obligation to monitor third tier temperature dials is far from clear. Prindiville testified hard frozen loads were stored in the upper tiers because they could survive the voyage without monitoring if weather conditions made temperature reading of upper tiers prohibitive. (Tr. 310). However, Donald Frank Miley, a

retired Sea-Land captain, testified a chief mate could not have refused to read third tier temperature dials. He stated: "such a refusal wouldn't be looked on kindly by either the master of the vessel or the marine superintendent or anybody else, since this type of activity was done by chief mates throughout the rest of the fleet, and if you cared to advance in the company, you wouldn't make that kind of objection." (Tr. 54). Moreover, there was substantial testimony regarding the importance of monitoring temperature, especially when the ship was carrying a large cargo. Under such circumstances, there would be more reefer vans than available electrical sockets, and plugs would have to be rotated to maintain temperatures in all of the reefers. (Tr. 275), (Deposition of Michael Eugene Bagley at 5, 34-35), (Deposition of James Anthony Ramirez at 14, 26). Finally, Sea-Land offered no evidence it would have put an end to third tier temperature reading if it had been advised of the danger. Indeed, it did not make this argument at trial

but first advanced it after the case had been remanded to the district court for an assessment of comparative negligence. Sea-Land offered no additional evidence on this issue on remand but simply argued on the basis of evidence offered at trial that company policy permitted Tinsley to refuse to read third tier reefer temperature dials if he believed it to be dangerous.[4/]

Because Sea-Land bore the burden of proof and there was significant evidence that Sea-Land would not have installed third-tier catwalks or abandoned temperature reading of third-tier reefers, the district court's finding that plaintiff's failure to report the dangerous condition was no more than ten percent of the cause of his injuries was not clearly erroneous.

[4/]We squarely rejected this argument in the first appeal. Tinsley, No. 89-35278 Slip op. at 10 (9th Cir. Oct. 29, 1990) ("[T]he company directive only authorized Tinsley to abstain from checking reefer temperatures in circumstances such as heavy weather. Under normal conditions, he was expected to climb all reefer stacks, including those without third-tier catwalks.").

IV.

Sea-Land argues Tinsley should be held to a higher standard of care because of his position as chief mate. The first treatise Sea-Land cites merely suggests the plaintiff's sailing experience is a relevant consideration in determining contributory negligence. See IB Benedict on Admiralty § 25 at 3-102 (7th ed. 1991). The section of the second treatise Sea-Land quotes is of no relevance here. It discusses discharge of crewmen and officers and suggests that an officer's minor disobedience need not be tolerated because an officer holds a position that requires a high degree of responsibility. See 1 Norris, The Law of Seamap 612-13. Finally, Skandalis v. M/V Galini, 1974 AMC 1671 (E.D. Va. 1974), on which Sea-Land also relies, is inapposite. In that case, a second mate, who was injured while moving a heavy box, was found to be contributorily negligent because he failed to use his authority to ask an inferior seaman to help him. Id. at 1673-75. While Tinsley was chief mate, the

individuals who could have approved a change in stacking frame structures or relieved him of temperature reading duties -- namely, someone in fleet operations or the ship construction department -- were superior to Tinsley in the chain of command. Plaintiff's authority is relevant only to the extent it might have been employed to avert the danger.

V.

Relying on Pan-Alaska Fisheries, Inc., 565 F.2d 1129, Sea-Land argues that where contributory negligence is found in a strict liability case, greater weight should be given to the plaintiff's negligence. Because Sea-Land was held strictly liable, no finding was ever made as to whether Sea-Land-was at fault. Accordingly, Sea-Land argues it should be liable for significantly less damages than Tinsley, who was found to have been negligent. The Pan-Alaska Fisheries case, however, does not support this proposition. To the contrary, as discussed earlier, Pan-Alaska Fisheries held the

appropriate comparison is relative causation not relative fault. 565 F.2d at 1139.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE F. TINSLEY; MARION TINSLEY,	
Plaintiffs-Appellees,	No. 91-35762
v.	D.C. No. CV-88-0190-JET
SEA-LAND CORPORATION, a corporation,	OPINION
Defendant-Appellant.	

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
October 9, 1992-San Francisco, California

Filed November 20, 1992

Before: James R. Browning, David R. Thompson and Andrew J. Kleinfeld, Circuit Judges.

Per Curium

SUMMARY

Civil Litigation and Procedure/Torts/Remedies/Negligence/Damages/Litigation and Procedure (Civil)

Affirming a district court judgment, the court of appeals held that because damages in a personal injury action were sufficiently ascertained as of the date of the original judgment when the appeals court ordered a reduction in the damage award in proportion to the plaintiff's comparative negligence, postjudgment interest on the reduced award was proper from the date of the original judgment.

Clarence F. Tinsley obtained a favorable judgment in a personal injury action brought against appellant Sea-Land Corporation. The district court awarded damages to Tinsley. however, on appeal, while affirming the finding of liability, the court held that Tinsley's negligence had contributed to his injuries and remanded for a determination of comparative negligence. The district court found Tinsley ten percent negligent and reduced the damage award

accordingly. The court also ordered Sea-Land to pay Tinsley postjudgment interest on the reduced award from the date of the original judgment.

[1] While interest is allowed on any money judgment in a civil case in district court calculated from the date of the entry of the judgment, interest may not be calculated from the date of a judgment for damages that was not supported by the evidence. [2] Here, the district court's determination of damages was not challenged as unsupported by the evidence or on any other ground, and its judgment was previously affirmed. The district court's determination of damages was viewed as correct to the extent permitted to stand, and interest on a judgment thus partially affirmed should be computed from the day of its initial entry. [3] The court did not need to consider Sea-Land's argument that Tinsley's failure to appeal the district court's omission of postjudgment interest in the original judgment precludes an award of interest. Interest accrues from the date of a

judgment whether or not the judgment expressly includes it, because such interest follows as a legal incident from the statute providing for it.

COUNSEL

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Ronald J. Bland and Harold F. Vhugen, Levinson, Friedman, Vhugen, Duggan & Bland, Seattle, Washington, for the plaintiffs-appellees.

OPINION

PER CURIAM

This is the second appeal in this personal injury action arising out of an accident on a ship owned and operated by the defendant Sea-Land Corporation. In its original judgment, the district court found the unseaworthy condition

of defendant's ship was the sole cause of plaintiff's injuries and awarded damages of $721,673. On appeal, we affirmed the finding of unseaworthiness, but held plaintiff's negligence had contributed to his injuries and remanded for a determination of comparative negligence. The district court found plaintiff 10% negligent and reduced the damage award accordingly. The court also ordered defendant to pay postjudgment interest on the reduced award from the date of the original judgment. Sea-land timely appears. We affirm.[1]

[1] The award of postjudgment interest is governed by 28 U.S.C. § 1961. See *Kotsopoulos v. Austria Shipping Co.*, 467 F.2d 91, 95 (2d Cir. 1972) (award of postjudgment interest in maritime actions is governed by 28 U.S.C. § 1961). Section 1961(a) provides "[i]nterest shall be allowed on any money judgment in a civil case recovered in the

---

[1]In this opinion we state our reasons for affirming the award of postjudgment interest. Our reasons for affirming the district court's determination of comparative negligence are stated in a separate unpublished disposition.

district court" and "shall be calculated from the date of the entry of the judgment." However, interest may not be calculated from the date of a judgment for damages that "was not supported by the evidence." *Kaiser Aluminum & Chemical corp. v. Bonjorno,* 494 U.S. 827, 836 (1990). As the Supreme Court explained in *Bonjorno*:

> "[T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Poleto v. Consolidated Rail Corp.,* [826 F.2d 1270, 1280 (3d Cir. 1987)]. Where the judgment on damages was not supported by the evidence, the damages have not been "ascertained" in any meaningful way.

Id. at 835-36.

[2] The question presented here is whether the damages were sufficiently ascertained as of the date of the original judgment where on appeal this court ordered the district court to reduce the damage award in proportion to the plaintiff's comparative negligence. When the court of Appeals affirms a district court judgment, interest is paid

from the date of the original judgment. *Home Sav. Bank, F.S.B. v. Gillam,* 952 F.2d 1152, 1162 (9th Cir. 1991). Here the district court's determination of damages was not challenged as unsupported by the evidence or on any other ground, and we affirmed that determination. We remanded solely to reduce the award in proportion to the plaintiff's negligence, instructing the district court to "reduce the damage award already calculated according to the percentage of [Tinsley's] fault." Slip. Op. at 13. By contrast, in *Bonjorno,* the court vacated the judgment completely and ordered a new trial on the issue of damages. *See* 494 U.S. at 830. Prior to *Bonjorno,* we had held that deletion of an item of damages does not result in an entirely new judgment. *United States v. Perkins,* 487 F.2d 672, 675-76 (9th Cir. 1973). Rather, "the district court's determination [is] viewed as correct to the extent it was permitted to stand, and interest on a judgment thus partially affirmed should be computed from the date of its initial entry." Id. at 676. The

Supreme Court decision *Bonjorno* did not change this rule because no portion of the original damage award in *Bonjorno* was "permitted to stand." The judgment in this case was permitted to stand to the extent of Sea-Land's responsibility for Tinsley's injuries; an award of interest from the date of the original judgment on this part of the judgment is therefore consistent with *Bonjorno*. *See also Cordero v. De Jesus-Mendez*, 922 F.2d 11, 16-18 (1st Cir. 1990).

[3] Sea-Land argues Tinsley's failure to appeal the district court's omission of postjudgment interest in the original judgment precludes an award of interest. We need not consider this contention because it was raised for the first time in Sea-Land's reply brief. *Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990). In any event, the claim is meritless. "Interest accrues from the date of a judgment whether or not the judgment expressly incudes it, because 'such interest follows as a legal incident from the statute

providing for it.'" *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (quoting *Blair v. Durham*, 139 F.2d 260, 261 (6th Cir. 1943)). *See also United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876 (1st Cir. 1971) ("Regardless of whether the judgment itself contains a specific award of interest, once final judgment has been entered in a civil suit in a federal court the prevailing party becomes a judgment creditor and is entitled to post-judgment interest under the mandatory terms of 28 U.S.C. § 1961.").

Sea-Land relies on *Lettsome v. United States*, 434 F.2d 907, 909-10 (5th Cir. 1970) and *Firth v. United States*, 554 F.2d 990, 995-96 (9th Cir. 1977). Neither is relevant here. These cases were brought under the Suits in Admiralty Act, 46 U.S.C. § 743, and the Public Vessels Act, 46 U.S.C. § 782, which provide for actions against the United States. Interest may be awarded on judgments under those statutes, but, unlike 28 U.S.C. § 1961, the award of interest is not

mandatory. *Lettsome*, 434 F.2d at 910; 46 U.S.C. §§ 743, 782.

AFFIRMED.

FILED
FEB 16 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE F. TINSLEY; MARION TINSLEY,	)
Plaintiffs-Appellees,	) No. 91-35762
v.	) D.C. No. CV-88-0190-JET
SEA-LAND CORPORATION, a corporation,	) ORDER
Defendant-Appellant.	)

Before: BROWNING, THOMPSON and KLEINFELD, Circuit Judges

In its petition for rehearing and suggestion for rehearing on banc, Sea-Land argues the panel overlooked Ludwig v. Pan Ocean Shipping Co., Ltd., 941 F.2d 849 (9th Cir. 1991). In Ludwig, this court held that a longshoreman was not entitled to recovery for in injury that occurred when

"he stepped down from a ladder onto snatch blocks nestled in a coiled lashing cable located at the bottom of the ladder." Id. at 850. The court held that, as an experienced seaman, Ludwig should have been "mindful" of the hazard. Sea-Land argues that Ludwig requires this court to apply a higher standard of care because of Tinsley's position as Chief Mate. Ludwig, however, is plainly distinguishable from this case. Ludwig could have avoided the danger simply by either looking where he was stepping or by moving the cable and snatch blocks. By contrast, in this case, the danger could have been avoided only by constructing a third-tier catwalk.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

(3)

No. 92-1868

In The

Supreme Court of the United States

October Term, 1992

SEA-LAND SERVICES, INC.,

Petitioner,

vs.

CLARENCE F. TINSLEY and MARION TINSLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court grant a Writ of Certiorari to review the Court of Appeals' conclusion that the primary duty rule was, as a matter of law and fact, inapplicable to the instant case?

2. In this seaman's personal injury case tried to the District Court in Admiralty, was the District Court clearly erroneous in apportioning liability 90% to Sea-Land Service and 10% to Clarence Tinsley?

3. Did the District Court's award of postjudgment interest on damages from the date of initial entry of judgment, rather than from the date of hearing on partial remand on an unrelated issue, contravene this Court's decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990)?

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

All of the opinions and judgments below are contained in Petitioner's Appendix to its Petition for a Writ of Certiorari. These include the District Court's Findings of Fact and Conclusions and Law in *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. C88-190T, Meg. Op. (W.D. Wash. March 27, 1989); the United States Court of Appeals for the Ninth Circuit's First Opinion in this matter, *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. 89-35278, Mem. Op. (9th Cir., October 29, 1990); the District Court's Supplemental Findings of Fact and Conclusions of Law; *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. C88-190 JET, Mem. Op. (W.D. Wash. May 29, 1991); the United States Court of Appeals for the Ninth Circuit's Second Memorandum Opinion, *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. 91-35762, Mem. Op. (9th Cir., Nov. 20, 1992); the Ninth Circuit's Published Opinion on the interest issue, *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* 979 F.2d 1382 (9th Cir., 1992); and the Ninth Circuit's Order Denying Petitioner's Request for a Rehearing or a Rehearing En Banc; *Clarence F. Tinsley, et ux. v. Sea-Land Corporation,* No. 91-35762, Order (9th Cir., Feb. 16, 1993).

INTRODUCTION

Petitioner's brief incorporates virtually the same arguments unsuccessfully advanced by Sea-Land first in the trial court in March of 1989, (Appendix at p. 1, hereafter simply "A-1"), second, in the Ninth Circuit Court of

Appeals (see Memorandum Decision rendered October 29, 1990 affirming the District Court's findings on damages and unseaworthiness, but remanding on comparative negligence) (A-13), third, on petition for rehearing before the Ninth Circuit denied December 27, 1990, fourth, at the remand hearing held in District Court (Supplemental Findings and Conclusions entered May 29, 1991, assessing 10% comparative fault set forth at A-37), fifth, before the second and separate Ninth Circuit panel which affirmed the trial court's supplemental findings in two separate opinions, the first on comparative fault set forth at A-47 and the second on interest set forth at A-61 issued on November 20, 1992, and, sixth, on petition for rehearing before the second Ninth Circuit panel denied February 16, 1993 set forth at A-71.

Sea-Land then waited until the very last day, May 18, 1993, to file its Petition for Certiorari raising in substance the same flawed arguments, to-wit: (1) that somehow because plaintiff was the chief officer on the Sea-Land container vessel and did not report the unseaworthy condition to Sea-Land's shoreside officials, he should bear all or most of the fault (as opposed to the 10% assessed by the trial court on remand); and (2) that notwithstanding the fact that plaintiff's total damages were definitively established by the trial court at the conclusion of the trial on March 24, 1989 (A-1) and affirmed by the Ninth Circuit on October 29, 1990 (A-13), plaintiff should not be entitled to interest until May 29, 1991, the date when the trial court entered its supplemental finding on remand of 10% comparative fault (A-34).

The only finding of comparative fault on plaintiff's part was the Ninth Circuit's conclusion that "Tinsley was

negligent in failing to report that climbing to the third tier was unsafe without a catwalk." (A-28). Despite the fact that the burden of proving comparative fault at all times rested squarely on Sea-Land, Sea-Land offered no evidence as to whether or not any other seaman including the four fellow crew members who testified as to the danger posed by the absent catwalk, ever reported the danger.

The reason why no permanent catwalk was installed at the third tier at the No. 4 hatch where plaintiff fell was not because Sea-Land did not know of the problem. As pointed out by the Ninth Circuit in its second memorandum opinion (A-47, at A-54):

> At trial, William Prindiville, Sea-Land's region manager of Fleet Operations, testified that permanent catwalks were a 'continuous maintenance problem' and were not worth installing simply because they might be needed on a few voyages a year.

Based upon the Prindiville testimony it might well be argued that the trial court's 10% reduction for comparative fault was too much rather than too little. Clearly these issues must lie within the province of the trial court and certainly not in the province of the Supreme Court.

Because all of the arguments advanced by Sea-Land in its petition have been exhaustively discussed and rejected by two separate Ninth Circuit panels in three separate and comprehensive opinions set forth in petitioner's Appendix beginning at pages A-13, A-47, and A-61, respectively, Tinsley does not believe that any worthwhile purpose would be served by attempting to respond in detail to the lengthy petition. The flaws were

obvious to the Ninth Circuit and we believe they will be equally obvious to the Supreme Court. Enough is enough!

Finally, we point out that Sea-Land, following the Supreme Court's rejection of its motion for stay of mandate on March 11, 1993, paid the judgment in full.

STATEMENT OF THE CASE

On March 27, 1989, following a bench trial, the District Court found as a matter of fact and law that:

> [T]here was no catwalk affixed to the stacking frame supporting the vans on the third tier of hatch #4 which rendered access to the refrigerated vans precarious and dangerous and thus unseaworthy.

(A-3). Sea-Land never challenged this finding of fact on appeal. The District Court also found that Sea-Land was responsible for the unseaworthy condition:

> The installation of a catwalk to the stacking frame supporting the third tier was shoreside work and was not part of plaintiff's responsibility or duties. (A-4).

Similarly, Sea-Land never challenged this finding of fact on appeal.

The District Court found that the unseaworthy condition proximately caused Tinsley's injuries and awarded $721,673.00 in damages. Sea-Land appealed claiming that Tinsley had breached an alleged primary duty by not reporting that catwalks were needed and in failing to specifically request catwalk installation. Sea-Land's argument that Tinsley should be barred from recovery in this

case was rejected by the District Court and also by the Court of Appeals. Sea-Land's contention was that certain factual findings as entered by the District Court were clearly erroneous. The Ninth Circuit respectfully and comprehensively disagreed.

Nonetheless, on the first appeal Tinsley was found to be comparatively negligent as a matter of law by the Ninth Circuit for his failure to report the unseaworthy condition. The case was remanded to the District Court for an apportionment of liability between Sea-Land and Tinsley. The Ninth Circuit did so subject to the following admonition:

> [W]e emphasize, however, that our opinion should not be read to express a view on what amount of reduction is appropriate. The District Court shall examine this question independently. (A-32-33)

Following the hearing on remand, the District Court apportioned liability 10% to Mr. Tinsley and 90% to Sea-Land.

Sea-Land once again appealed to the Ninth Circuit and made all of the same arguments to that Court (attacking the District Court's factual findings in support of its apportionment of damages as clearly erroneous (A-51 to A-58)) that it is now making in the Supreme Court. The Court of Appeals concluded that the District Judge's apportionment of liability was not clearly erroneous and affirmed the same.

The Ninth Circuit also concluded on appeal that post judgment interest should run from the date of the initial

entry of judgment because on appeal Sea-Land had never questioned the amount of damages, focusing only on liability. Damages were fully and finally ascertained at the conclusion of the first trial and only later reduced for 10% comparative fault. The Ninth Circuit's remand following the first appeal was expressly limited to the issue of apportionment of fault. All damage findings by the District Court were upheld (A-24-25, A-32-33). As stated by the Ninth Circuit:

> On remand, the district court shall determine the extent for which Sea-Land's liability is offset by Tinsley's negligence, and shall reduce the damage award *already calculated* according to the percentage of his fault. (Emphasis added, A-32).

This is precisely what the District Court did.

SUMMARY OF ARGUMENT

Applying the standards of Supreme Court Rule 10, none of the issues which Sea-Land raises in its Petition merit this Court granting a Writ of Certiorari. Sea-Land tries to dress its Petition for Writ of Certiorari up as one involving important issues of maritime law and as a case requiring the Supreme Court to correct the United States Court of Appeals for the Ninth Circuit's interpretation of a recent Supreme Court decision, namely, *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570 (1990). Sea-Land's arguments, all of which are at bottom factual in nature, have been aired and rejected *ad nauseum* by both the District Court and by two separate panels of the Ninth Circuit.

The Ninth Circuit's published opinion on the post judgment interest issue, *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382 (9th Cir. 1992), is in complete harmony with the Supreme Court's recent opinion on the matter, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), and, contrary to Sea-Land's assertion, there is no conflict in the circuits regarding this issue. For these reasons, Sea-Land's Petition for a Writ of Certiorari should be denied.

ARGUMENT

1. The Primary Duty Rule is Inapplicable.

The Ninth Circuit considered the so-called "primary duty" defense at length (A-16-A-22). The Ninth Circuit based upon a careful review of the evidence and following its most recent and well-reasoned formulation of the rule in *California Home Brands, Inc. v. Farrieira*, 871 F.2d 830, 836 (9th Cir. 1989) – a case curiously omitted from Sea-Land's petition – declined to apply the primary duty rule.

As stated by the Ninth Circuit on the first Tinsley appeal:

> "[i]n order for the primary duty rule to apply, the employee must have failed to perform a *specific, positive* duty for which he had *primary* responsibility." *Id.* at 836 n.3 (emphasis added to the word "specific"). Drawing on *Walker* and *Dixon*, the court made clear that the duty alleged must be specific. As Learned Hand explained in *Walker*, the duty must be "consciously assumed as a term of employment."

> *Walker*, 193 F.2d at 773. According to Judge (later Justice) Harlan, the duty must be so clearly delineated that, if breached, the employer would have a cause of action against the employee. *Dixon*, 219 F.2d at 16-17.
>
> By contrast, plaintiff in the present case was told in a highly generalized way that he was responsible for maintaining a safe ship. He was never instructed to make reports detailing where he perceived catwalks were needed. The primary duty rule covers only those situations where the failure to undertake an explicitly assigned duty backfires on the very person who was inattentive to it – where the connection between the seaman's negligence and his own mishap is so strong as to justify a total bar to recovery.
>
> If we were to accept Sea-Land's position, seamen with broad responsibilities like plaintiff would rarely recover in tort; ironically, they would be responsible for nearly every unseaworthy condition causing them harm. Moreover, ship owners would have an incentive to broadly define the duties of their seamen, with the effect that an assumption of risk standard would begin to prevail in maritime law. Such an outcome would contradict the basic principle that a ship owner's duty to provide a seaworthy ship is absolute and nondelegable.

(A-20-21).

The Ninth Circuit's analysis was correct and does not warrant review by the Supreme Court.

2. Sea-Land Only Seeks To Overturn the District Court's Factual Findings Which Were Affirmed by the Ninth Circuit. Therefore, the Petition for Writ of Certiorari Should be Denied.

A Writ of Certiorari should be granted only when there are overriding issues of general public importance or the need to secure uniformity of federal law. Wright, Miller & Cooper, *Federal Practice and Procedure,* Section 4004 (1977). It is well settled that the Supreme Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). In particular, "the ordinary negligence case under the Federal Employer's Liability Act does not satisfy the criteria that define the 'special and important reasons' when a Writ of Certiorari will be granted[.]" *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 532 (1957) (Justice Frankfurter, dissenting). Contrary to Sea-Land's position, this is just such a garden-variety seaman's case. The factual nature of Sea-Land's Petition is amply demonstrated by a review of its brief. Pages 8 to 16 deal directly with the factual background and merely reiterate Sea-Land's factual contentions in the District Court. Sea-Land's factual contentions in large measure were rejected by the District Court and twice by the Court of Appeals.

Sea-Land attempts to dress its factual argument up as one involving an issue of law concerning the various duties of a chief mate and ship owner. Sea-Land employs this tactic because the apportionment of fault in a maritime case is a question of fact and is subject to the clearly erroneous standard of review. See *U.S. Fire Ins. Co. v. Allied Towing Corp.,* 966 F.2d 820, 823 (4th Cir., 1992) (apportionment of liability in a maritime case reviewed

for clear error). In the final analysis, Sea-Land is asking the Supreme Court to reexamine and reweigh the evidence adduced at trial. This is not the Supreme Court's role and never has been.

3. The Ninth Circuit's Decision is Thoroughly Consistent with *Kaiser Aluminum & Chemical Corp. v. Bonjorno.*

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 836, 110 S.Ct. 1570, 1576 (1990), the Supreme Court stated:

> Where the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way.

If the damages have not been properly ascertained, then post judgment interest cannot run from the date of entry of the first judgment. At the first *Bonjorno* trial, the District Court entered a directed verdict in favor of Kaiser. The Court of Appeals for the Third Circuit then reversed, holding that there was sufficient evidence for the case to go to the jury. *Columbia Metal Culvert Company, Inc., v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20, 37 (3rd Cir. 1978). In 1979, a second trial resulted in a jury verdict in the plaintiffs' favor in the amount of $5,445,000. The District Court, however, held that the evidence did not support the jury's damage award and granted a motion for a new trial as to damages. *Bonjorno v. Kaiser Aluminum & Chemical Corp.,* 518 F. Supp. 102, 109, 119 (1981). On retrial, the jury on December 2, 1981, awarded treble damages in the amount of $9,567,939. This judgment was

ultimately affirmed by the Third Circuit. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 815 (3rd Cir. 1984). The issue before the Supreme Court was simply whether or not the plaintiff was entitled to interest from the date of the 1979 judgment which was set aside in its entirety for insufficient evidence or from the date of the 1981 judgment which was ultimately affirmed.

The Supreme Court held in *Bonjorno,* 110 S.Ct. at 1576,

> Where the judgment on damages was not supported by the evidence, the damages had not been "ascertained" in any meaningful way.

Therefore, the Supreme Court concluded that interest should begin to run only from the date when the damages were "ascertained", pointing out that post-judgment interest may not be calculated from a damage judgment that was completely reversed *Bonjorno,* 110 S.Ct. at 1576 (*citing FDIC v. Rocket Oil Co.*, 865 F.2d 1158 (10th Cir. 1989)).

In Tinsley, not only were the damages fully ascertained and established on March 24, 1989 when the District Court entered judgment, but the Ninth Circuit in its memorandum *per curiam* opinion specifically affirmed the damage award, remanding solely for a determination of the percentage that Tinsley was at fault for failing to report the unseaworthy condition. (A-32, 33) To reiterate, the Ninth Circuit affirmed the trial court's damage award in Tinsley. In *Bonjorno,* the 1979 damage award was reversed and never reinstated. A new trial was held on damages resulting in a second verdict in 1981, the date from which interest properly ran.

The Ninth Circuit in *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382 (9th Cir., 1992), held that Tinsley's damages were fully and completely ascertained at trial. This was the correct conclusion because Sea-Land never attacked the quantum of damages, instead it merely argued that it was not liable for any damages whatsoever as a matter of law and/or that the judgment should be reduced based upon Tinsley's comparative fault. After the first appeal, the case was remanded to the District Court for a hearing on apportionment of comparative fault only (not a new trial on damages) and the District Court apportioned fault 90% against Sea-Land and 10% against Tinsley. The amount of the judgment which had originally been entered was therefore reduced by 10%. Sea-Land was only required to pay post judgment interest on the amount of the award that stood after the reduction for comparative negligence and Sea-Land cannot argue that it is prejudiced in any manner. Tinsley's damages were fully ascertained at the conclusion of the initial trial and Sea-Land paid post judgment interest on that amount exactly as intended and required by 28 U.S.C. § 1961.

There is no conflict among the circuits and there is absolutely nothing whatsoever in the instant Petition which requires or even justifies the Supreme Court's attention. In fact, the Ninth Circuit's decision in *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382 (9th Cir., 1992), is in complete harmony with the First and Eighth Circuit's post-*Bonjorno* decisions. *H. J., Inc. v. Flyato Corp.*, 925 F.2d 257, 261-62 (8th Cir., 1991); *Cordero v. DeJesus-Mendez*, 922 F.2d 11, 15-18, 20 (1st Cir., 1990).

CONCLUSION

Plaintiff suffered what turned out to be a career-ending injury on September 5, 1987, and is currently 65 years old. In summary, he has waited almost six years for the wheels of justice to painstakingly turn in his favor through two district court trials, two separate appeals and two petitions for rehearing. Again, enough is enough.

Sea-Land's petition is totally without merit. Respondents respectfully request a prompt denial.

DATED this 17 day of June, 1993.

Respectfully submitted,

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